Supreme Court, U.S.
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NO. _____

IN THE

UNITED STATES SUPREME COURT

CHARLES LEE McCALLISTER
Petitioner

VS.

THE STATE OF TEXAS
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE TEXAS COURT OF CRIMINAL APPEALS

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QUESTIONS PRESENTED

Whether the doctrine of stare decisis is sufficiently intricate to our system of justice that all courts, including the Texas appellate courts, are required to comply with its dictates in every appeal such that the failure to do so in an individual case violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Whether Due Process and Equal Protection of the Law guaranteed by the Fourteenth Amendment to the United States Constitution is violated where, in the absence of notice or hearing, a person is ordered incarcerated upon a judgment and sentence that has expired during the period an appeal is being prosecuted but before the return of the appellate court's mandate.

Whether a state appellate system that allows the unfettered discretion to make its appellate decisions selectively prospective, vary rules of law on an ad hoc basis, and render the doctrine of stare decisis nugatory comports with the Due Process and Equal Protection of the Laws and the Fourteenth Amendment to the United States Constitution.

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OPINIONS BELOW AND JURISDICTION

The opinion of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas and the Texas Court of Criminal Appeals' orders denying a petition for discretionary review and motion for rehearing are not designated for publication. The judgment of the Fourteenth Court of Appeals was issued on February 28, 2006, and by that same court the motion for rehearing was denied on May 18, 2006. The order denying McCallister's petition for discretionary review was issued by the Texas Court of Criminal Appeals on November 22, 2006. McCallister's motion for rehearing was denied and overruled by that Court on January 31, 2007.

This Court has jurisdiction pursuant to 28 U.S.C. 1257.

RELEVANT CONSTITUTIONAL PROVISION

Sec[illegible] 1of the Fourteenth Amendment to the United States Constitution provides:

> Section 1. ... No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was convicted for driving while intoxicated by a jury sitting in the County Criminal Court at Law Number Fourteen of Harris County, Texas ; the Honorable Michael Fields presiding. Punishment was assessed by the jury at fifteen days in the Harris County Jail. That sentence, contrary to law, was suspended by the trial court judge who assessed a term of community supervision for a period of one year. The judgment entered by the trial court set the date for community supervision to expire on February 23, 2005. After the fifteen days sentencing period assessed by the jury expired, Petitioner duly and timely filed his notice of appeal.

Petitioner appealed the judgment to the Fourteenth Court of Appeals. A three justice panel sitting at Houston, Texas, rendered an unpublished judgment and memorandum opinion filed on February 28, 2006, affirming the conviction and jury sentence. On April 10, 2006, Petitioner filed a timely motion for rehearing which was, by order entered by the Court

of Appeals, summarily overruled on May 18, 2006.

Within the time allowed after the granting of an extension of time, Petitioner filed with the Texas Court of Criminal Appeals sitting in Austin, Texas, his petition for discretionary review on June 6, 2006. The Petitioner's motion for rehearing that was duly and timely filed on December 27, 2006, was summarily overruled and denied by order of the Court of Criminal Appeals entered on January 31, 2007.

The mandate of the Fourteenth Court of Appeals was issued by that Court on February 8, 2007. Notwithstanding the filing of a motion to recall the mandate filed with the Fourteenth Court of Appeals pending the filing of this present petition with this Court, the Honorable Michael Fields, presiding over the County Criminal Court at Law No. 14 of Harris County, Texas, issued an order this date, May 1, 2007, requiring that Petitioner be taken into custody in execution of the judgment entered by the jury. Petitioner is presently being restrained of his liberty as a result of the present order and

mandate issued by the Fourteenth Court of Appeals.

REASONS FOR GRANTING THE WRIT

This case represents the potential abuse of state powers in every misdemeanor case across the country where acts and practices of a state's judicial branch are provided unmitigated and unreviewable authority to expose those who exercise their right to appeal to punishment on the sole authority of an appellate court's return of its mandate. Such a practice contravenes the Due Process Clause of the Fourteenth Amendment to the United States Constitution and violates the very letter and spirit of this Court's holdings in **North Carolina v. Pearce**, 395 U.S. 711 (1969) and **Blackledge v. Perry**, 417 U.S. 21 (1974). This Court has held that once avenues of appellate review are established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. **Griffin v. Illinois**, 351 U.S. 12 (1956); **Douglas v. California**, 372 U.S. 353 (1963); **Lane v. Brown**, 372 U.S. 477 (1963); **Draper v Washington**,

372 U.S. 487 (1963); **Rinaldi v. Yeager**, 384 U.S. 305 (1966); **Eskridge v. Washington State Board**, 357 U.S. 214 (1958); **Williams v. Oklahoma City**, 395 U.S. 458 (1969).

The instance of placing a person in confinement upon the return of an appellate court mandate after the judgment appealed has expired is, as the facts here disclose, subject to repetition yet, unless the United States Supreme Court grants this petition and issues a writ of certiorari, will evade review and thereby allow a practice that is designed for no other purpose other than to chill the exercise of the right to appeal. **Super Tire Engineering Co. v. McCorkle**, 416 U.S. 115 (1974).

The series of acts and practices of the Texas appellate courts that have occurred in this Petitioner's case during the exercise of his right to appeal and upon the return of the mandate by the State appellate courts to the trial court, is an old story that has been reviewed and declared unconstitutional on many occasions. See, e.g., **Robinson v. Beto**, 426 F.2d 797

(5th Cir. 1970); **Pruett v. Texas**, 468 F.2d 51 (5th Cir. 1972), aff'd and modified in part, 470 U.S. 1182 (5th Cir. 1973), aff'd 414 U.S. 802 (1973). Moreover, the very instance that has occurred in this Petitioner's case in exercising his right to appeal and the use of unpublished opinions, tend only to conceal a practice of appellate review bent on discouraging the exercise of that right and should not be tolerated under the doctrine of stare decisis. In **Thomas v. Washington Gas Light Co.**, 448 U.S. 261, this Court wrote regarding the doctrine that:

> For that doctrine not only plays an important role in orderly adjudication; it also serves the broader societal interests in evenhanded, consistent, and predictable application of legal rules. When rights have been created or modified in reliance on established rules of law, the arguments against their change have special force.

But the irony in this case is the Texas appellate courts have not overruled any of its precedent nor rendered a published opinion that abdicates these issues; it simply misrepresents the issues

that were raised on appeal by the Petitioner as well as the facts so as to conform to the legal precedent it cites to justify its judgment to affirm convictions, as here.

In his motion for rehearing to the Texas Court of Criminal Appeals, Petitioner pointed out that the Court should exercise its authority to grant review and narrowly tailor the application of **TEX. TRANS. CODE § 545.421**[1] proscribing

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[1] § 545.421. FLEEING OR ATTEMPTING TO ELUDE POLICE OFFICER; OFFENSE. (a) A person commits an offense if the person operates a motor vehicle and wilfully fails or refuses to bring the vehicle to a stop or flees, or attempts to elude, a pursuing police vehicle when given a visual or audible signal to bring the vehicle to a stop. (b) A signal under this section that is given by a police officer pursuing a vehicle may be by hand, voice, emergency light, or siren. The officer giving the signal must be in uniform and prominently display the officer's badge of office. The officer's vehicle must be appropriately marked as an official police vehicle. (c) Except as provided by Subsection (d), an offense under this section is a Class B misdemeanor. (d) An offense under this section is a Class A misdemeanor if the person, during the commission of the offense, recklessly engages in conduct that places another in imminent danger of serious bodily injury. (e) A person is presumed to have recklessly engaged in conduct placing another in imminent danger of serious bodily injury under Subsection (d) if the

conduct that fits within the statute's meaning where the several courts of appeals had differed as to its interpretation and where the danger existed that allowed police unfettered discretion to interpret the law and apply it as they saw fit. Upon review, the various interpretation by police and courts, when reading the statute, it cannot be determined whether the statute comes into play immediately when the police engage their emergency lights so that everyone within sight is required to immediately stop subject to a charge of evading to anyone who does not stop; when the police engage their emergency lights and siren; whether 30 feet or 300 feet or 3000 feet is reasonable or constitutes probable cause to believe a person is evading; whether pulling over to a side street to avoid danger of freeway

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person while intoxicated knowingly operated a motor vehicle during the commission of the offense. In this subsection, "intoxicated" has the meaning assigned by Section 49.01, Penal Code. Acts 1995, 74th Leg., ch. 165, § 1, eff. Sept. 1, 1995.

traffic or pulling over to the side of the highway regardless of traffic or weather conditions is reasonable or is an unsatisfactory stop to the police officer who might consider either act as one that interferes with his authority to stop a vehicle; or any number of acts which allows innocent act of complying with the law to be construed as criminal at the whim and caprice of the officer so that, as in this case, turning a suspected speeding violation into a confrontation where police are authorized to engage the use of deadly force, threats, and custodial arrest where there is nothing threatening to the officer from a person who exits his vehicle at gunpoint clad in little more than a tee-shirt, shorts, and barefooted. However, notwithstanding the danger to every citizen who operates a motor vehicle upon the roads and highways of the State of Texas to be subjected to the various police interpretations of that law so as to render it void for vagueness on its face and as applied under the principles that the statute is overbroad, indefinite, over-inclusive and subject to capricious

interpretation and arbitrary application at the whim of police, the Fourteenth Court of Appeals without comment by the Court of Criminal Appeals chose instead to frame the issues so as to avoid a limiting construction and guide to the statute's application. This disregard and evasion of Petitioner's claims on appeal by the Texas appellate courts was in the face of a direct challenge that the court of appeals' decision was in direct conflict with the Supreme Court's holdings in **Papachristou v City of Jacksonville**, 405 U.S. 156 (1972) and **Grayned v. City of Rockford**, 408 U.S. 104 (1992). Yet, the Texas Court of Criminal Appeals remained silent on the issue and allowed the Court of Appeals' mandate to issue. As a consequent result, Petitioner has been jailed and the constitutional question remains unresolved.

Petitioner pointed out to the Texas Court of Criminal Appeals on motion for rehearing that, as it stands, at least in the eyes of the Petitioner, though a critical stage in the criminal proceedings and constitutionally preserved by the Equal

Protection Clause of the United States Constitution and the statutory laws of the State of Texas, what can be gleaned from the statements by the Court of Appeals is sufficient basis to believe, when considering the nature and unsupported position taken by the panel, Petitioner has been deprived of a full, fair and adequate review on direct appeal. Petitioner argued that the Court of Criminal Appeals should exercise its discretionary authority to rectify and declare the substantive responsibility that resides and to which all appellants, including Petitioner, are entitled and may expect from an independent and honorable judiciary. However, the Court of Criminal Appeals remained silent on the issue and, as a consequence, Petitioner has been jailed upon return of the appellate courts' mandate.

The Texas Court of Criminal Appeals has also remained silent where complaint was made that, because the Supreme Court will be presented with a substantial question regarding appellate courts of the State of Texas and their interjection of unprecedented sua sponte issues that fail to address those that

were presented by the appellant/litigants, violates procedures such as requiring that the intermediate appellate courts address every issue raised by the appellant which rules are applied to some but not others when presenting their appeals to these intermediate courts.[2] As a result, notwithstanding the corrective authority and constitutional duty of the Texas Court of Criminal Appeals to remedy these unreasonable tactics that essentially deprive an appellant of the right to a full and fair resolution of issues raised on appeal, Texas intermediate appellate courts have been so far deviated from the course of consistency in the application of the laws that the constitutional doctrine of stare decisis is weakened by holdings that are inconsistent and in conflict with the rights of citizens

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[2] **TEXAS RULES OF APPELLATE PROCEDURE 47.1** provides that "[t]he court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal. ..." See, **Light v. State**, 15 S.W.3d 104, 105 (Tex.Cr.App. 2000); **Davis v. State**, 817 S.W.2d 345, 346 (Tex.Cr.App. 1991).

throughout the State of Texas. The permissibility of these unprecedented and foreign practices infringes upon the right to a fair and adequate review insomuch that the right to appeal is rendered meaningless. See, **Professor Andrew T. Solomon's review, "*A Simple Prescription for Texas' Ailing Court System: Stronger Stare Decisis*"**, 37 St. Mary's L. J. 417 (2006). Moreover, the permissibility of these practices violate Petitioner's right to a fair, reasonable, full and adequate review of the issues raised on appeal rendering the practices contrary to the letter and spirit of this Court's holdings and reasoning in **Lozada v. Deeds**, 498 U.S. 430 (1991); **Parker v. Dugger**, 498 U.S. 308 (199); **Sawe Regina College v. Russell**, 499 U.S. 225 (1991); and **Williams v. Oklahoma City**, 395 U.S. 458 (1969). See also, **Notes, "*The Right to Appeal and Appellate Procedural Reform*"**, 91 Columbia L. Rev. 373 (1991). Notwithstanding these claims, the Texas Court of Criminal Appeals remained silent. As a consequence, Petitioner has been placed in jail on a judgment that has expired and one that

is, in all reasonable probability, void as secured in violation of the United States Constitution.

All individuals are entitled to Due Process and Equal Protection of the Laws. U.S. Const., amend. XIV, § 1. Equal Protection and Due Process rest on the doctrines of precedent and stare decisis, because all citizens before the Court are guaranteed to be subject to the same laws. As this Court declared:

> [N]o judicial system could do society's work if it eyed each issue afresh in every case that raised it. ... Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.

Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992).

By its silence on the issues in denying review of the Fourteenth Court of Appeals in this case, the Texas Court of Criminal Appeals runs afoul of equal protection and due process by allowing for the creation of a system of "selective prospectivity" wherein the courts create new rules of law which

will apply to one case and one case only. This Court has utterly rejected "selective prospectivity" as unconstitutional in both criminal and civil cases.

This Court first dispensed with selective prospectivity in the criminal arena in **Griffin v. Kentucky**, 479 U.S. 314 (1987). In that case, this Court held that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." Id. At 322. This Court reasoned that "selective application of new rules violates the principle of treating similarly situated defendants the same." Id. at 324.

Four years later, this Court rejected "selective prospectivity" in the civil context. See **James B. Beam Distilling Co. v. Georgia**, 501 U.S. 529 (1991); see also **Harper v. Virginia Dept. of Taxation**, 509 U.S. 86 (1993). While this Court recognized that new rules of law may or may not be given retroactive effect, once a Court has applied the law retroactively to one litigant, it must, as a matter of due

process and equal protection, apply that rule to all litigants. See **James B. Beam Distilling Co. V. Georgia**, 501 U.S. 529, 535-536 (1991).

> "[s]elective prospectivity also breaches the principle that litigants in similar situations should be treated the same, a fundamental component of stare decisis and the rule of law generally. ... 'We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law.'"

Id., at 537-538, quoting from **Desist v. United States**, 394 U.S. 244, 258-259 (1969).

This Court has also stressed that such a system of "selective prospectivity" undermines the system of stare decisis which is the hallmark of our system of justice. See id., at 540. This concern was elaborated upon by Justice Blackmun in his concurrence:

> The doctrine of stare decisis profoundly serves important purposes in our legal system. Nearly half a century ago, Justice Roberts cautioned: 'Respect for tribunals

> must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy.' ... By announcing new rules prospectively or by applying them selectively, a court may dodge the stare decisis bullet by avoiding the disruption of settled expectations that otherwise prevents us from distributing our settled precedents. Because it forces us to consider the disruption that our new decisional rules cause, retroactivity combines with stare decisis to prevent us from altering the law each time the opportunity presents itself.

Id., at 548.

Finally, the federal guarantee of Due Process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government. **Brinkerhoff-Faris Trust & Savings Co. v. Hill**, 281 U.S. 673. This Court has defined Due Process of Law as follows:

> Whatever differences may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of

> legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the enforcement and protection of private rights.

Pennoyer v. Neff, 85 U.S. 733.

When a state court of the highest resort abandons those rules and principles and allows its inferior courts to run amuck of the law that has been established in its system of jurisprudence for the enforcement and protection of private rights or, in other respects allowing these appellate court to "dodge the stare decisis bullet", it not only violates the Due Process rights of the individual litigants but also fosters contempt for the law and mistrust of the legal system. Stare decisis is one of the most fundamental and important concepts in American jurisprudence.[3] Inconsistent decision making and

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[3] The doctrine of stare decisis requires courts "to abide by, or adhere to, previously decided cases." **Black's Law Dictionary** 1261 (95th ed. 1979). Thus, if a case before the court has similar facts and raises issues similar to those of previously decided cases, the present case should be decided in the same manner as the earlier case. In the

disregard for the applicable rules of procedure that are vital to an appellant's right of review violates a cardinal principle of appellate justice – the "uniform and coherent enunciation and application of the law." **Paul D. Carrington et al, Justice on Appeal** 11 (1976).[4]

Disregard for precedent and rules of procedure makes it impossible for lawyers, litigants, and trial courts to ascertain precisely what law governs any particular dispute. The resulting uncertainty increases litigation, wastes judicial

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Federalist Papers, Alexander Hamilton emphasized the importance of precedent and stare decisis when he explained that "[t]o avoid arbitrary discretion in the courts, it is indispensable that they [the courts] should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular cases that comes before them." **The Federalist No. 78**, at 529 (Alexander Hamilton)(Jacob E. Coke ed., 1961).

[4] See also, **Henry J. Friendly, Indiscretion About Discretion**, 31 Emory L. J. 747, 758 (1982)(noting that uniformity is "the most basic principle of jurisprudence"); **Ruth Bader Ginsburg & Peter W. Huber, The Intercircuit Committee**, 100 Harv. L. Rev. 1417, 1424-1425 (1987)(stating that "[u]niformity promotes the twin goals of equity and judicial integrity").

resources, and leads to an inconsistent application of the law so that citizens reliance upon interpretations of the law are frustrated and it leads to inconsistent and even contrary application by law enforcement officers. Failure to adhere to the fundamental stare decisis by our courts of law breeds contempt by those entrusted with its enforcement and compliance. That is why this case is so important and should be heard and atonement made by this Court. For if there is no justice in this Court there is no justice anywhere for Petitioner or anyone else who litigates in the State of Texas.

CONCLUSION

For all of the reasons set forth above, Petitioner requests the Supreme Court of the United States grant this petition and issue a writ of certiorari and thereafter grant such other and further relief to which, in equity and law, Petitioner

may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Petition has been this day placed in the United States Mail, postage prepaid, addressed to the office of the State Prosecuting Attorney, P. O. Box 12405, Austin, Texas 78711.

Dated: July 13, 2007.

Charles Lee McCallister

APPENDIX 1

Affirmed Memorandum Opinion filed February 28, 2006.

In The

Fourteenth Court of Appeals

NO. 14-04-00375-CR

CHARLES LEE McCALLISTER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 14

Harris County, Texas

Trial Court Cause No. 1191661

MEMORANDUMOPINION

Charles Lee McCallister appeals a conviction for driving while intoxicated **ftnref1**[1] ftnref1 ("DWI") on the grounds that: (1) his constitutional rights were violated by the trial court's denial of his motion to suppress evidence obtained from a search of his vehicle; (2) radar detection evidence

was admitted in error; (3) his constitutional right to remain silent was violated; and (4) he was denied effective assistance of counsel. We affirm.

Suppression of Evidence

Appellant's first and second issues contend that he was subjected to an illegal *de facto* arrest at the inception of his traffic stop when Deputy Smith, with his weapon drawn, ordered appellant out of his vehicle and onto the ground, where appellant remained until a second officer, Deputy McCall, arrived, handcuffed appellant, and placed him in the back of a patrol car. Appellant argues that because this arrest was without probable cause and objectively unreasonable, the evidence that was obtained in the ensuing search of his vehicle **ftnref2**[2] ftnref2 was illegally obtained and thus inadmissible at trial.

We review a trial court's ruling on a motion to suppress with great deference to the trial court's determination of historical facts, while reviewing *de novo* the court's application of the law. *Torres v. State*, __ S.W.3d __, 2005 WL 3310462, at *2 (Tex. Crim. App. 2005). Where, as here, no findings of fact are made, the evidence is viewed in the light most favorable to the trial court's ruling, and we assume that the trial court made implicit findings of fact that support its ruling, as long as the findings are supported by the record. *Id.*

A police officer may arrest an offender without a warrant for any offense committed in his presence or view. Tex. Code Crim. Proc. Ann. art. 14.01(b) (Vernon 2005). Violations of subtitle C of the Transportation Code are generally among the offenses for which an officer may arrest without a warrant. **ftnref3**[3] ftnref3 Tex. Transp. Code Ann. ' 543.001 (Vernon 1999). A person commits the misdemeanor offense of fleeing or attempting to elude a police officer when he willfully fails or refuses to bring his vehicle to a stop when given a visual or audible signal by a pursuing police vehicle.

See id. ' 545.421(a). Once an officer has probable cause to arrest, he may search the passenger compartment of a vehicle as a search incident to that arrest. *Thornton v. U.S.*, 541 U.S. 615, 623 (2004); *see also Glazner v. State*, 175 S.W.3d 262, 265 (Tex. Crim. App. 2005).

In this case, Smith initially began pursuing appellant for speeding. However, rather than pulling over in response to Smith's emergency lights and siren, appellant drove several miles down the freeway at the same speed, bypassing several locations at which to safely pull over. Smith thus radioed the police dispatcher that he was in pursuit of a vehicle and needed assistance in stopping it. Because appellant maintained his speed and bypassed several safe opportunities to stop despite Smith's signals to do so, Smith had probable cause to arrest him without a warrant for fleeing or attempting to elude. **ftnref4**[4] ftnref4 *See* Tex. Transp. Code Ann. ' 543.001. **ftnref5**[5] ftnref5

Finally, once appellant was handcuffed and placed in the back of Smith's patrol car, Smith observed that appellant had bloodshot eyes, a flushed face, a strong odor of alcohol on his breath, and mental confusion. Thus, at this point, Smith also had probable cause to arrest appellant without a warrant for DWI. *See* Tex. Penal Code Ann. " 49.01(2), 49.04(a) (Vernon 2003); *see also State v. Ballard*, 987 S.W.2d 889, 893 (Tex. Crim. App. 1999).

This evidence, viewed in the light most favorable to the trial court's ruling, supports the trial court's implied determination that, prior to searching appellant's vehicle, **ftnref6**[6] ftnref6 Smith had probable cause to arrest appellant for evasion and DWI, and thus authority to search appellant's vehicle incident to the arrest. *See Thornton*, 541 U.S. at 623; *Glazner*, 175 S.W.3d at 265. Accordingly, appellant's first and second issues fail to demonstrate that the trial court erred in denying appellant's motion to

suppress, and are overruled.

Radar Evidence

Appellant's third issue argues that radar detection evidence was improperly admitted over his objection because: (1) the State failed to establish that the radar device was working properly on the occasion in question; (2) the only basis for Smith's belief that appellant was committing a traffic offense was Smith's reliance on the radar device; and (3) Smith testified that appellant's speed influenced his belief that appellant was intoxicated. However, appellant fails to explain how this evidence, which established reasonable suspicion for Smith to stop appellant for speeding. **ftnref7**[7] ftnref7 (1) would have been inadmissible *for that purpose* (*i.e.*, to establish reasonable suspicion) due to the lack of evidence he alleges regarding the device; or (2) was material to his conviction for DWI. **ftnref8**[8] ftnref8 Accordingly, because appellant's third issue does not demonstrate either error or harm **ftnref9**[9] ftnref9 in the admission of the radar evidence, it is overruled. **ftnref10**[10] ftnref10

Right to Remain Silent

Appellant's fourth and fifth issues complain that his constitutional right to remain silent was violated by: (1) the admission of the deputies' testimony regarding his post-arrest silence; (2) opening and closing arguments by the State; and (3) admission of testimony regarding appellant's refusal to submit to field sobriety tests or sign forms.

A defendant's constitutional right to remain silent and not have that silence used against him at trial **ftnref11**[11] ftnref11 is a forfeitable right. *See Wheatfall v. State*, 882 S.W.2d 829, 836 (Tex. Crim. App. 1994). Consequently, a defendant must object to preserve complaints concerning admission of evidence indicating his

pre- or post-arrest silence. *Id.* Additionally, responses to requests for identification and reference to refusals of field sobriety testing generally do not violate the privilege against self-incrimination protected by the right to remain silent. *See Griffith v. State*, 55 S.W.3d 598, 603 (Tex. Crim. App. 2001); *Miffleton v. State*, 777 S.W.2d 76, 79-80 (Tex. Crim. App. 1989).

Appellant specifically complains that his right to remain silent was violated when: (1) Smith testified that appellant's response to Smith's request for identification was, [W]hat identification? '; (2) during closing argument, the State reminded the jury that Deputy McCall had tried to talk to appellant about his confusing answers to questions regarding appellant's behavior; (3) the State elicited testimony during trial that appellant refused to submit to field sobriety tests, refused to sign forms, and answered questions in a confusing manner; and (4) the State argued that appellant chose not to submit to various field sobriety tests during opening and closing argument. However, because appellant did not object to any of these alleged violations, none are preserved for our review. **ftnref12**[12] ftnref12 *See* Tex. R. App. P. 33.1.

Appellant also argues that this right was violated when Deputy Smith testified that appellant wasn't saying anything while he was lying on the ground beside his vehicle. However, because appellant objected to this testimony only after several other questions had been asked and answered, the objection was not timely and thus failed to preserve this complaint for our review. **ftnref13**[13] ftnref13 *See* Tex. R. App. P. 33.1; *see also Lagrone v. State*, 942 S.W.2d 602, 618 (Tex. Crim. App. 1997). Appellant additionally contends that the State violated his right to remain silent by mentioning, during closing argument, that he had refused to sign a breath test refusal form. However, appellant's objection to this argument was that there was no evidence that appellant refused to sign it, not that his right to

remain silent had been violated. Because appellant's objection at trial does not comport with his constitutional complaint on appeal, it presents nothing for our review. *See Swain v. State*, 181 S.W.3d 359, 367 (Tex. Crim. App. 2005). Accordingly, appellant's fourth and fifth issues are overruled.

Ineffective Assistance of Counsel

Appellant's sixth issue contends that he was denied the effective assistance of counsel because his trial counsel failed to: (1) request an instruction based on article 38.23 of the Texas Code of Criminal Procedure; **ftnref14**[14] ftnref14 and (2) object each time the prosecutor commented on appellant's post-arrest silence. A defendant's right to effective assistance of counsel is denied when a defense attorney's performance falls below an objective standard of reasonableness and there is a reasonable probability that, but for the error, the result of the proceeding would have been different. *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003); *Wiggins v. Smith*, 539 U.S. 510, 521, 534 (2003); *Scheanette v. State*, 144 S.W.3d 503, 509 (Tex. Crim. App. 2004), *cert. denied*, 543 U.S. 1059 (2005). Appellate review of defense counsel's representation is highly deferential and presumes that counsel's actions fell within the wide range of reasonable and professional assistance. *Scheanette*, 144 S.W.3d at 509. Without a record establishing trial counsel's reasons for the challenged action or omission, the presumption of reasonable trial strategy can only be overcome where no reasonable trial strategy could justify that action or omission. *See Andrews v. State*, 159 S.W.3d 98, 101-03 (Tex. Crim. App. 2005). Even where counsel focuses on some issues to the exclusion of others, ineffectiveness is not shown unless the omitted matters were clearly more persuasive than those asserted. **ftnref15**[15] ftnref15 To show ineffective assistance of counsel for the failure to object during trial, an

appellant must show that the trial court would have committed error in overruling the objection. *Ex parte White*, 160 S.W.3d 46, 53 (Tex. Crim. App. 2004).

In this case, appellant contends that the illegality of his arrest and precluding the State from introducing evidence of his post-arrest silence were both central to his defense. However, appellant failed to develop a record of his trial counsel's reason for not requesting an article 38.23 instruction, and has not shown that a choice not to pursue the legality of his arrest with the jury was either unreasonable as a matter of law or clearly more persuasive than the issues counsel elected to emphasize. **ftnref16[16]** ftnref16 In addition, the unobjected to comments on appellant's post-arrest silence included only his response to requests for identification and reference to his refusal of field sobriety testing, neither of which violated his privilege against self-incrimination. *See Griffith*, 55 S.W.3d at 603; *Miffleton*, 777 S.W.2d at 79-80. Because the trial court would not have erred in overruling these objections, his counsel cannot be deemed ineffective for failing to assert them. *See White*, 160 S.W.3d at 53. Similarly, appellant has provided no basis to conclude that, but for these alleged errors, there is a reasonable probability that the outcome of his trial would have been a not guilty verdict or a lesser punishment. *See Bone v. State*, 77 S.W.3d 828, 837-38 (Tex. Crim. App. 2002). Because appellant's sixth issue thus fails to demonstrate ineffective assistance of counsel, it is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman

Justice

Judgment rendered and Memorandum Opinion filed February 28, 2006.

.Panel consists of Justices Edelman, Seymore, and Guzman.

Do Not Publish C Tex. R. App. P. 47.2(b).

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ftn1[1] ftn1 A jury convicted appellant and assessed a 15 day sentence. However, the trial court suspended the sentence and placed appellant on community supervision for one year.

ftn2[2] ftn2 This evidence consisted of a half-empty bottle of whiskey and a glass with what smelled like whiskey residue.

ftn3[3] ftn3 However, for the offense of speeding, the officer must issue a written notice to appear, and, if the person arrested signs it, the officer must promptly release the person. *See* Tex. Transp. Code Ann. " 543.004(a), 543.005 (Vernon Supp. 2005).

ftn4[4] ftn4 Additionally, while in pursuit of appellant, Smith saw appellant throw something out of his driver's side window, and lean forward and reach backward several times. Smith testified that he was quite concerned at this point that appellant was retrieving or hiding a weapon. After appellant pulled off the well-lit freeway and finally came to a stop on a side street, Smith drew his weapon and ordered appellant to remain in his vehicle with his hands visible. Rather than obey this order, appellant again began reaching around in the passenger compartment of his truck, so Smith ordered appellant out of the vehicle and onto the ground next to appellant's truck where Smith's spot light was shining. However, instead of complying, appellant walked to the front of his truck, where Smith saw appellant putting his hands in the waistband of his pants and then momentarily lost sight of him. Smith then shouted at appellant to lie down on the roadway, and appellant finally complied. Smith held appellant at gunpoint until McCall arrived, handcuffed appellant, and put him in the backseat of Smith's patrol car.

Although not central to our disposition, appellant's brief fails to demonstrate that under these circumstances Smith did not have reasonable grounds to believe he could be in danger of bodily harm or injury, and was therefore justified in taking such precautions as drawing his gun and ordering appellant to lie face down next to his vehicle.

ftn5[5] ftn5 *See also Randolph v. State*, No. 14-98-00514-CR, 2000 WL 38783 (Tex. App.CHouston [14th Dist.] Jan. 20, 2000, pet. ref'd) (not designated for publication).

ftn6[6] ftn6 Smith testified that his reason for looking inside the vehicle was to find appellant's identification because appellant was unable to provide it upon request.

ftn7[7] ftn7 An officer's use of a radar device to determine that a defendant was traveling above the speed limit provides adequate grounds to stop a defendant without a warrant. *McClain v. State*, 984 S.W.2d 700, 702 (Tex. App.CTexarkana 1998, pet. ref'd).

ftn8[8] ftn8 The case appellant relies on in support of his argument that the radar evidence was improperly admitted involved the admission of such evidence *as proof of guilt* of speeding. *See Ochoa v. State*, 994 S.W.2d 283, 285 (Tex. App.CEl Paso 1999, no pet.).

ftn9[9] ftn9 We disregard all non-constitutional errors that do not have a substantial and injurious effect or influence in determining the jury's verdict. Tex. R. App. P. 44.2(b); *Russell v. State*, 155 S.W.3d 176, 179 (Tex. Crim. App. 2005).

ftn10[10] ftn10 Moreover, Smith testified that, based on his training and experience, he would have determined appellant was speeding even without radar.

ftn11[11] ftn11 The Fifth Amendment of the United States Constitution protects post-arrest silence made only *after*

Miranda warnings have been given. *Fletcher v. Weir*, 455 U.S. 603, 605-06 (1982), *Doyle v. Ohio*, 426 U.S. 610, 611 (1976). However, article I, section 10 of the Texas Constitution protects post-arrest silence even before such warnings have been administered. *Heidelberg v. State*, 144 S.W.3d 535, 537 (Tex. Crim. App. 2004).

ftn12[12] ftn12 Appellant acknowledges this deficiency in his sixth point of error, alleging that his trial counsel was ineffective for failing to object, discussed below.

ftn13[13] ftn13 Appellant also moved for a mistrial, which was denied by the trial court, but he has not challenged the denial of the mistrial on appeal. Similarly, although appellant argues on appeal that error occurred during the State's examination of Deputy Blanco, the trial court instructed the jury to disregard the objected to question, and appellant has not challenged the trial court's denial of his motion for a mistrial.

ftn14[14] ftn14 Article 38.23 provides that, in any case where the evidence raises an issue regarding whether evidence was obtained in violation of any law or provision of the United States or Texas Constitution, "the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then, and in such event, the jury shall disregard any such evidence so obtained." Tex. Code Crim. Proc. Ann. art. 38.23 (Vernon 2005). Appellant contends that there were several fact issues surrounding the legality of his arrest.

ftn15[15] ftn15 *See Yarborough*, 540 U.S. at 7-9; *Smith v. Robbins*, 528 U.S. 259, 288 (2000).

ftn16[16] ftn16 *See Ramirez v. State*, 76 S.W.3d 121, 128 (Tex. App.CHouston [14th Dist.] 2002, pet. ref'd) (holding that trial counsel could not be found ineffective when appellant did not file a motion for new trial and the record

contained no evidence behind his trial counsel's actions in failing to request such an instruction).

APPENDIX 2

NO. PD - 00993-06

IN THE
TEXAS COURT OF CRIMINAL APPEALS
SITTING AT AUSTIN, TEXAS

CHARLES LEE McCALLISTER,
Appellant,

versus

THE STATE OF TEXAS,
Appellee.

On Appeal from the County Criminal Court at Law No. 14 of Harris County, Texas
Trial Court Cause No. 1191661
14th Court of Appeals No. 14-04-00375-CR

PETITION FOR DISCRETIONARY REVIEW

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TO THE HONORABLE JUDGES OF THE TEXAS COURT OF CRIMINAL APPEALS:

NOW COMES CHARLES LEE McCALLISTER, Petitioner in this cause, and, pursuant to the provisions of **TEX.R.APP.PROC. 66, *et seq.***, moves this Court to grant discretionary review, and in support will show as follows:

STATEMENT OF THE CASE

Petitioner was convicted by a jury sitting in the County Criminal Court at Law Number 14 of Harris County, Texas, for the offense of driving while intoxicated. [CR Vol. I, 95, 110-13] Punishment was assessed at fifteen days in the Harris County Jail which was suspended and Petitioner placed on community supervision for a term of one year. [CR Vol. I, 107, 110-13; Supp. Cr Vol. I, 3-8]

A motion for new trial was not filed and, on February 24, 2004, Petitioner gave timely written notice of appeal.

STATEMENT OF PROCEDURAL HISTORY

Petitioner appealed to the Fourteenth Court of Appeals, a panel of which rendered an unpublished judgment and memorandum opinion filed on February 28, 2006, affirming the conviction and sentence, a true and correct copy which is attached hereto as **Appendix A** and made reference herein the same as if copied in full and set forth at length.

On April 10, 2006, Petitioner filed a timely motion

for rehearing which was, by order entered by the Court of Appeals on May 18, 2006, summarily overruled, a true and correct copy which is hereto attached as **Appendix B.**

Petitioner now files this petition for discretionary review pursuant to **Rule 68** of the **Texas Rules of Appellate Procedure**.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals failed to use the correct legal standard, failed to consider all relevant evidence in the record, and failed to afford proper deference to the trial court's findings and conclusions and, instead, acted to supplant itself as the sole finder of fact to reach a conclusion that was contrary to that of the trial court.

2. Whether the objective admissible evidence at trial justified the arresting officer's stop of Petitioner's vehicle so that the officer's subsequent conduct of ordering Petitioner at gunpoint out of his vehicle and to lay down on the rain soaked roadway was a reasonable response to the circumstances or constituted an illegal *de facto* arrest prohibited by Article 1, Section 9 of the Texas Constitution, the Fourth and Fourteenth Amendments to the United States Constitution, Section 543.005 of the Texas Transportation Code, and Articles 14.01, 14.04, and 38.23 of the Texas Code of Criminal Procedure.

3. Whether the Court of Appeals erred in failing to properly address Petitioner's third point of error and thereafter misapplied the proper standard of

review as it related to whether the initial basis for pursuing Petitioner was without reasonable cause where evidence of the radar device used by the arresting officer to detect the Petitioner's speed was inadmissible and, therefore, improperly relied upon to determine Petitioner had committed an offense in the presence of the arresting officer.

4. Whether the Court of Appeals misapplied the proper standard of review and erred in holding that Petitioner failed to establish that defense counsel was rendered ineffective assistance in failing to request a jury charge in compliance with Article 38.23 of the Texas Code of Criminal Procedure.

ARGUMENT

***FIRST QUESTION FOR REVIEW, RESTATED*: Whether the Court of Appeals failed to use the correct legal standard of review, failed to consider all relevant evidence in the record, failed to afford proper deference to the trial court's findings and conclusions and, instead, acted to supplant itself as the sole finder of fact to reach a conclusion that was contrary to that of the trial court.**

This Court should review this issue because the Court of Appeals has decided an important question of state and federal law in a way that conflicts with the applicable decisions of the Court of Criminal Appeals and the Supreme Court of the United States. **TEX.R.APP.PROC., Rule 66.3(c).**

The Court of Appeals recites the appropriate standard of review regarding issues presented under

Article 1, Section 9 of the **Texas Constitution** in stating that a trial court's ruling on a motion to suppress is reviewed by providing great deference to the trial court's determination of historical facts, while reviewing de novo the court's application of the law. **Torres v. State**, 182 S.W.3d 899, at 900 (Tex.Cr.App. 2005).[1] For a court of appeals to examine the reasonableness of an arrest, and specifically the existence of probable cause, it must consider all of the circumstances. See, **Terry v. Ohio**, 392 U.S. 1, 21 (1968); **Hulit v. State**, 982 S.W.2d 431, 435-436 (Tex.Cr.App. 1998). In doing so, the Court of Criminal Appeals in **Guzman v. State**, 955 S.W.2d 85 (Tex.Cr.App. 1997), citing to **DuBose v. State**, 915 S.W.2d 493, 498 (Tex.Cr.App. 1996), reiterated that

> "intermediate appellate courts should reverse a trial court's ruling on application of law to fact questions only when it appears the trial court applied an erroneous legal standard, *or when no reasonable view of the record could support the trial court's conclusion under the correct law and the facts viewed in the light most favorable to its legal conclusion.*"

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[1] See also, **State v. Ross**, 32 S.W.3d 853 (Tex.Cr.App. 2000); **Guzman v. State**, 955 S.W.2d 85 (Tex.Cr.App. 1997); **Loserth v. State**, 963 S.W.2d 770 (Tex.Cr.App. 1998); **Viveros v. State**, 828 S.W.2d 2 (Tex.Cr.App. 1992); **Dubose v. State**, 915 S.W.2d 493 (Tex.Cr.App. 1996); **State v. Gray**, 158 S.W.3d 465 (Tex.Cr.App. 2005).

Id., 955 S.W.2d at 497-498 (emphasis in original as supplied).

In this Petitioner's case, the Court of Appeals properly applied a de novo review of the trial court's application of the law to the facts and correctly held that the Petitioner was under arrest at the very inception of the confrontation when the officer directed all of Petitioner's movements at the point of a gun. This, of course, reversed the trial court's conclusion that, under these same circumstances, the Petitioner was ***not*** under arrest. [RR Vol. III, 60] However, the Court of Appeals in this case, instead of adhering to the Court of Criminal Appeals' holdings that it should reverse the trial court's decision if its conclusion cannot be supported by a reasonable review of the record, instead, became a substitute fact finder by failing to consider all of the evidence.

In reaching the conclusion that Appellant's arrest was justified on the basis that Petitioner had committed the offense of fleeing or attempting to elude, the Court of Appeals' finding is not only contrary to the overwhelming weight of the evidence, but is a finding that neither the State nor the trial court advanced as a justification for the officer's decision to begin pursuing Petitioner's vehicle subsequently resulting in Petitioner's arrest.

Once the Court of Appeals concluded that the trial court abused its discretion in holding that the Appellant was not under arrest, it was under the holdings in ***Dubose, Guzman***, and ***Torres, supra***, required to reverse the trial court's ruling as an abuse of discretion and then determine whether the error was harmful. The Court of Appeals'

effort to supplant itself as the sole fact finder once it determined that the trial court had abused its discretion in concluding that Petitioner was not under arrest, is inconsistent with and misapplies the appropriate standard of review. In this instance, the Court of Appeals abandoned its role as an appellate forum and substituted itself as the finder of fact to reach a conclusion of law contrary to the evidence and the trial court's ruling.

Citing **Arcila v. State**, 834 S.W.2d 357, 360 (Tex.Cr.App. 1992), the Court of Criminal Appeals in **Dubose v. State**, 915 S.W.2d 493 (Tex.Cr.App. 1996), discussed the general policy to which a court of appeals must adhere when reviewing decisions on motions to suppress:

> ... We held that as a general policy, this Court will not interfere with an appellate court's decision as long as the court of appeals, in reviewing the trial court, used the correct legal standard, ***considered all relevant evidence in the record***, and afforded proper deference to the trial court as primary fact finder. ...

Id. at 495 (emphasis supplied).

Of significant import is the holding in **State v. Gray**, 158 S.W.3d 465 (Tex.Cr.App. 2005), *aff'g*, 157 S.W.3d 1 (Tex.App.-Tyler 2004). In that case, it is important to note that upon consideration of all the evidence and the written findings of the trial court, the court of appeals, affirmed by the Court of Criminal Appeals, was capable of reaching a decision that was

contrary to the trial court but such a conclusion was based upon considering all of the evidence which did not intrude upon the findings of the trial court and then applying the law to the facts. "The court of appeals' decision did not trespass on the trial court's discretion in finding facts." ***Id.***

In this instant Petitioner's case, not only did the Court of Appeals conduct a de novo review for applying the law to the facts, but it likewise sifted through the record to find facts - though contrary to the trial court - that would justify its conclusion to affirm Petitioner's conviction. This is clearly in total contrast with and contrary to the holdings of the Court of Criminal Appeals and the Supreme Court of the United States. **Tex.R.App.Proc. 66.3(c)**.

Permitting the Court of Appeals to use such a substitute standard of review to preempt the trial court's fact findings, from which the record here discloses to be insufficiently supported, relegates further the mandates of the ***Fourth Amendment*** and ***Article 1, Section 9*** so as to avoid compliance with and application of the Legislative mandate of **TEX.CODE CRIM.PROC. 38.23.** Therefore, the Court of Criminal Appeals should exercise its discretionary authority as the "caretaker of Texas law" to enjoin this particular misinterpretation and unreasonable exercise of authority by the Court of Appeals.

***SECOND QUESTION FOR REVIEW, RESTATED*: Whether the objective admissible evidence at trial justified the arresting officer's stop of Petitioner's vehicle so that the officer's subsequent conduct ordering Petitioner at gunpoint out of his**

vehicle and to lay down on the rain soaked roadway was a reasonable response to the circumstances or constituted an illegal *de facto* arrest prohibited by Article 1, Section 9 of the Texas Constitution, the Fourth and Fourteenth Amendments to the United States Constitution, Section 543.005 of the Texas Transportation Code, and Articles 14.01, 14.04, and 38.23 of the Texas Code of Criminal Procedure.

The Court of Appeals' holding in this case regarding the stop of Petitioner's vehicle for speeding, misconstrues a statute, regulation, or ordinance and thereby decides an important question of state and federal law that has not been, but should be, settled by the Court of Criminal Appeals. **TEX.R.APP.PROC. 66.3(b) and (d).**

The Court of Appeals adopted its own independent findings and thereafter reached its conclusion that the officer had probable cause to arrest Petitioner for fleeing or attempting to elulde detention or arrest. The Court of Appeals writes that, "[a]lthough not central to our disposition, appellant's brief fails to demonstrate that under these circumstances Smith did not have reasonable grounds to believe he could be in danger of bodily harm or injury, and was therefore justified in taking such precautions as drawing his gun and ordering appellant to lie face down next to his vehicle." **[Appendix A, at pp. 2 and 6 at footnote 4]** .

Upon review of Petitioner's opening brief at pp. 15-24 and his reply brief at pp. 7-19, such a statement by the Court of Appeals is left with little credulity as if, for whatever reason, the opinion's unanimous panel failed

either to read or chose instead to ignore Petitioner's pleadings. The fact references and arguments contained in those pleadings are abundant with explanation as well as authority reviewed and settled by the Court of Criminal Appeals signifying as well as mandating that the actions and conduct of the arresting officer in this Petitioner's case was unreasonable; that his interpretation of the law was such that, if the Court of Appeals' decision is left for precedent, would render the application of **TEX.TRANS. CODE § 545.421,** proscribing evading arrest or detention, constitutionally void for vagueness on its face and as applied under the principles that the statute is overbroad, indefinite, over-inclusive, and subject to capricious interpretation and arbitrary application at the whim of police.[2] Allowed to remain without a proper interpretation and construction to limit police activity under the law, the statute acts as a "trap for the innocent" because it fails to give notice so as to violate the first essential of due process of law. See, **United States v. Cardiff**, 344 U.S. 174, 176, 73 S.Ct. 189 (1952); **Connally v. General Constr. Co.**, 269 U.S. 385, 391, 46 S.Ct. 126 (1926). See also, **Petitioner's Motion for Rehearing at pp. 3-8.**

The Court of Criminal Appeals should exercise its authority to grant review and narrowly tailor the application and interpretation of **TEX.TRANS. CODE § 545.421** proscribing conduct that fits within the statute's meaning. Officer Smith's conclusion that Petitioner's

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[2] See, **Papachristou v. City of Jacksonville**, 405 U.S. 156, 162, 92 S.Ct. 839 (1972); **Grayned v. City of Rockford**, 408 U.S. 104, 92 S.Ct. 2294 (1992); **Adley v. State**, 718 S.W.2d 682, 685 (Tex.Cr.App. 1985).

actions on the date and at the time in question were reasonable and prudent under the totality of the circumstances then existing suffices to dispute his trial testimony that his actions were in response to "evading". As was pointed out by Petitioner to the Court of Appeals, a comparison between the facts in Petitioner's case and those cases of fleeing and eluding or evading arrest or detention reviewed by appellate courts in this State, make clear that there was no offense of eluding or evading.[3] This is especially true upon considering the arresting officer's agreement that Petitioner's actions were reasonable and prudent. See, e.g., **United States v. Miguel**, 111 F.3d 666 (9th Cir. May 27, 2004).[4]

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[3] See, **Rogers v. State**, 832 S.W.2d 442 (Tex.App.-Austin 1992, no pet); **Rhoades v. State**, 84 S.W.3d 10 (Tex.App.-Texarklana 2002, no pet); **Thorneberry v. State**, 72 S.W.3d 389 (Tex.App.-Fort Worth 2002, pet dism'd); **Smith v. State**, Tex.App-Amarillo 1985), *pdr granted and aff'd*, 739 S.W.2d 848 (Tex.Cr.App.); **Covarrubia v. State**, 902 S.W.2d 549 (Tex.App.-Houston [1st Dist] 1995, pdr ref'd); **Cook v. State**, 1 S.W.3d 722 (Tex.App.-El Paso 1999); **Brooks v. State**, 76 S.W.3d 426 (Tex.App.-Houston [14th Dist] 2002); **Walker v. State**, 95 S.W.3d 516 (Tex.App.-Ft Worth 2002); **Blackmon v. State**, 644 S.W.2d 738 (Tex.Cr.App. 1983); **Smith v. State**, 739 S.W.2d 848 (Tex.Cr.App. 1987).

[4] In **U.S. v. Miguel**, 111 F.3d 666 (2004), the U.S. Ninth Court of Appeals held: "We have distinguished between mistakes of fact and mistakes of law when an officer has initiated a traffic stop based on a mistaken belief. '[I]f an officer makes a traffic stop based on a mistake of law, the stop violates the Fourth Amendment.' *United States v. Twilley*, 222 F.3d 1092, 1096 (9th Cir. 2000). For

As it stands, at least in the eyes of this Petitioner, though a critical stage of the criminal proceedings and constitutionally preserved by the **Equal Protection Clause** of the **U.S. Constitution** and the statutory laws of the State of Texas, what can be gleaned from the statements by the Court of Appeals is sufficient basis to believe, when considering the nature and unsupported position taken by the panel, Petitioner has been deprived of a fair, full and adequate direct appeal which the Court of Criminal Appeals should exercise its discretionary authority to rectify and declare the substantive responsibility that resides and to which appellants, including Petitioner, are entitled and may expect from an independent and honorable judiciary.

With regard to **TEX.TRANS. CODE §§ 545.421** and the statutes' violation that played a pivotal role in this Petitioner's case and the required exclusion of evidence secured as a result of a violation thereof, in accord with **TEX.CODE CRIM.PROC., Article 38.23**, discretionary review should be granted to resolve any conflicts among the Courts of Appeals and to dispel any question regarding the statutes' validity and the limitations placed upon police who are engaged in stopping citizens for speeding. See,

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example, in *United States v. King*, 244 F.3d 736 (9th Cir. 2001), the officer stopped a car with a placard hanging from the rearview mirror, which he believed was unlawful. *Id* at 737-38. Construing the traffic ordinance, we concluded that placing an object in close proximity but not directly on the windshield did not violate the traffic ordinance. *Id* at 740. This, we held that the officer made a mistake of law and did not have reasonable suspicion to stop the vehicle. ***Id.*** at 741-742."

Berrett v. State, 152 S.W.3d 600 (Tex.App.-Houston [1st Dist] 2004); **State v. $30,600.00 in U.S. Currency**, 136 S.W.3d 392 (Tex.App.-Corpus Christi 2004). ***Cf.*** **Atwater v. City of Lago Vista**, 532 U.S. 318, 121 S.Ct. 1536 (2001).

***THIRD QUESTION FOR REVIEW, RESTATED*: Whether the Court of Appeals erred in failing to properly address Petitioner's third point of error and thereafter misapplied the proper standard of review as it related to whether the initial basis for pursuing Petitioner was without reasonable cause where evidence of the radar device used by the arresting officer to detect the Petitioner's speed was inadmissible and, therefore, improperly relied upon to determine Petitioner had committed an offense in the presence of the arresting officer.**

The Court of Appeals failed to reach Petitioner's third point of error in which he insists that the trial court erred in overruling his objections to the introduction of radar (speed detection) device evidence. Inasmuch as the Court of Appeals' holding is unsupported by the record[5] and completely ignores the thrust of Petitioner's claims as it related to the basis upon which the officer attempted to

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[5] For instance, the Court of Appeals misreads the Reporter' Record at Vol. III, pp. 45-46 to reach its conclusion at footnote 10 that: "Moreover, Smith testified that, based on his training and experience, he would have determined appellant was speeding even without radar." That he "***could***" make such an assessment does not mean that he "***did***" make such a determination. See also, Appellant's Reply Brief, at pp. 21-23.

justify his initial pursuit of Petitioner's vehicle, the Court of Appeals has so far departed from the accepted and ususal course of judicial proceedings as to call for an exercise of the Court of Criminal Appeals' power of supervision to assure the Petitioner's right to an effective appeal process. **TEX.R.APP.PROC., Rule 66.3(f)**.

The Court of Appeals erroneously misconstrued and basically altered Petitioner's argument and third ground of review. Instead, the Court of Appeals read the Petitioner's arguments to its own satisfaction and did not reach the issue raised by Petitioner. Petitioner's ground of review called upon the Court of Appeals to determine whether the use of an admitted inaccurate device, known to the officer to be defective and of which he was unable to satisfy by proper predicate for admission into evidence under **TEX.R.CRIM.EVID. 702** and the holdings in **Sexton v. State**, 93 S.W.3d 96 (Tex.Cr.App.2002); **Matson v. State**, 819 S.W.2d 839 (Tex.Cr.App. 1991); **Kelly v. State**, 824 S.W.2d 568 (Tex.Cr.App. 1992); and **Emerson v. State**, 880 S.W.2d 759 (Tex.Cr.App. 1994), was harmful error and an abuse of the trial court's discretion, particularly when the issue of its admission related directly to the officer's initial decision to institute an investigation and initiate his pursuit of Petitioner for speeding. See, **Appellant's Opening Brief, at pp. 24-30.**

Petitioner raised issue by his opening brief at pp. 29-30 that it was the officer's reliance upon the radar device ***alone*** upon which he initiated his pursuit of Petitioner whom he claimed was speeding. As stated in Petitioner's opening brief, "[t]he issue went directly to whether the initiation of the stop by Deputy Smith was lawful and weighed in the calculus testified to by Deputy

Smith and as considered by the jury whether Appellant was intoxicated" and whether the stop of Petitioner was lawful. **Appellant's opening Brief at p. 29.** Not only did Petitioner raise issue that the admission of the radar evidence was an abuse of discretion, but he also pointed out that its admission was harmful error from the standpoint of establishing that the officer's pursuit and stop of Petitioner's vehicle was illegal and unjustified since, without the radar evidence, there was no reasonable and articulable basis for the officer's pursuit or stop of Petitioner's vehicle which was the basis for the Court of Appeals' finding that Petitioner had committed the offense of fleeing or attempting to elude. See, **Appellant's opening Brief, pp. 29-30; Appellant's Reply Brief, at pp. 19-23.** In fact, the Court of Appeals found that the officer "initially began pursuing appellant for speeding." **Appendix A, p. 2.** However, notwithstanding Petitioner's complaint on appeal and the clear and unequivocal error and abuse of discretion by the trial court in admitting the radar/speeding evidence to which Petitioner insisted was harmful, the Court of Appeals nonetheless concluded that, "because appellant's third issue does not demonstrate either error or harm in the admission of the radar evidence, it is overruled." **Appendix A, at p. 3.**

TEX.R.APP.PROC. 47.1 provides that "[t]he court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal. ..." See, **Light v. State**, 15 S.W.3d 104, 105 (Tex.Cr.App. 2000); **Davis v. State**, 817 S.W.2d 345, 346 (Tex.Cr.App. 1991). Having failed to properly address Petitioner's third point of error ***as raised and claimed as a basis for error by Petitioner***, the Court of Appeals has failed to comply with

the Court of Criminal Appeals' directive and the Court of Appeals' responsibility to comply with the requirements of **Rule 47.** Thus, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court of Criminal Appeals' power of supervision. **TEX.R.APP.PROC. 66.3(f).**

Petitioner is entitled to a fair, reasonable, full and adequate review of the issues raised on appeal. Failure to provide that review to which Petitioner was entitled violates both the letter and spirit of the **Equal Protection Clause** of the **Fourteenth Amendment to the United States Constitution.**[6] Therefore, this Court should exercise its discretionary review where the court of appeals has decided an important question of state or federal law in a way that conflicts with the applicable decisions of the Supreme Court of the United States and where the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court of Criminal Appeals' power of supervision. **TEX.R.APP.PROC., Rule 66.3 (c) and (f).**

***FOURTH QUESTION FOR REVIEW, RESTATED*: Whether the Court of Appeals**

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[6] *Cf.* **Lozada v. Deeds**, 498 U.S. 430, 111 S.Ct. 860 (1991); **Parker v. Dugger**, 498 U.S. 308, 111 S.Ct. 731 (1991); **Sawe Regina College v. Russell**, 499 U.S. 225, 111 S.Ct. 1217 (1991); **Williams v. Oklahoma City**, 395 U.S. 458 (1969); **Notes, "The Right to Appeal and Appellate Procedural Reform"**, 91 Columbia L. Rev. 373 (1991).

misapplied the proper standard of review and erred in holding that Petitioner failed to establish that defense counsel rendered ineffective assistance in failing to request a jury charge in compliance with Article 38.23 of the Texas Code of Criminal Procedure.

The Court of Appeals' holding that defense counsel was not ineffective for having failed to request a jury instruction as required by **Article 38.23** of **the Texas Code of Criminal Procedure** conflicts with Petitoner's Sixth and Fourteenth Amendment rights to effective assistance of counsel. See, e.g., **TEX.CODE CRIM.PROC. Art. 38.23. Cf. Kimmelman v. Morrison,** 477 U.S. 365 (1986).

The issue of whether Petitioner's arrest was illegal and without probable cause from the very inception of the stop was central to the Petitioner's defense. Thus, notwithstanding the lack of a hearing on the issue of ineffective assistance, there simply was no reasonable trial strategy resulting from trial counsel's failure to require the trial court to charge the jury as to the legality of the stop required by **Article 38.23 of the Texas Code of Criminal Procedure**.

Since the Court of Appeals itself found, contrary to the trial court, that Petitioner was subjected to an arrest, such a conclusion by the Court of Appeals was sufficient evidence alone that there was an issue raised during Petitioner's trial to warranted an **Article 38.23** charge to the jury. The Court of Criminal Appeals in **State v. Ross**, 32 S.W.3d 853 (Tex.Cr.App. 2000), held that, notwithstanding the uncontested testimony of the arresting officer, the fact-finder may believe or disbelieve all or any

part of the officer's testimony. ***Id.*** Though a correct statement of the law, this holding is in conflict with other holdings of the Court of Criminal Appeals, that there must be a contested issue before an **Artricle 38.23** charge is required for which discretionary review should be granted to resolve. See, e.g., **Thomas v. State**, 723 S.W.2d 696, 707 (Tex.Cr.App. 2986); **Pierce v. State**, 32 S.W.3d 247, 251 (Tex.Cr.App. 2000); **Garza v. State**, 126 S.W.3d 79, 85 (Tex.Cr.App. 2004).

However, given that the burden of proof for a trial court (preponderance of evidence) is different than that of the jury (beyond a reasonable doubt), when the issue of the legality of an arrest is raised by the evidence and becomes central to the defense, the failure of trial counsel to request that the jury determine the issue of the legality of the arrest under the standard of beyond a reasonable doubt deprived this Petitioner of a fundamental requisite of Due Process and Due Course of the Law. **U.S. CONST., Amends. V and XIV; TEX.CONST., Art. 1, §§ 10 and 29.**[7]

The issue regarding the legality of the arrest was raised in this case. That is all that **Article 38.23** required. The issue was central to the defense so that the failure of trial counsel to request a charge required by **Article 38.23** was unreasonable as a matter of law.The Court of

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[7] See, e.g., **Reynolds v. State**, 967 S.W.2d 493, 495 (Tex.App.-Houston [1st Dist] 1998), *aff'd*, 4 S.W.3d 13 (Tex.Cr.App. 1999); **Vrba v. State**, 69 S.W.3d 713 (Tex.App.-Waco 2002)(When the entirety of the State's case relies on the validity of a traffic stop, the trial court may properly instruct the jury that it must enter a verdict of acquittal if it finds that the facts do not provide a valid basis for the stop.).

Appeals' holding to the contrary is, therefore, wrong and is in conflict with the applicable decisons of the Court of Criminal Appeals and the Supreme Court of the United States for which discretionary review should be granted. **TEX.R.APP.PROC., Rule 66.3(c).**

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully prays that this Court grant discretionary review and, after full briefing on the merits, issue an opinion reversing the Court of Appeals' judgment and remanding the cause to the trial court for a new trial.

Respectfully submitted,

Charles Lee McCallister
Attorney at Law/Petitioner
State Bar No. 13354700
1420 West 15th St., Suite 100
Houston, Texas 77008-3728
Ph: (713) 869-8300

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Petition for Discretionary Review has been this day placed in the United States Mail, postage prepaid, addressed as follows:

Office of District Attorney
Harris County, Texas
1201 Franklin, Suite 600
Houston, Texas 77002

Office of State Prosecuting Attorney
P. O. Box 12405
Austin, Texas 78711

Dated: July 19, 2006.

_____

Charles Lee McCallister

APPENDIX 3

APPEAL NO. 14-04-00375-CR

IN THE COURT OF APPEALS
FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT
SITTING AT HOUSTON, TEXAS

CHARLES LEE McCALLISTER,
Petitioner,

versus

THE STATE OF TEXAS,
Respondent.

On Appeal from the County Criminal Court at Law
No. 14 of Harris County, Texas
Trial Court Cause No. 1191661

MOTION FOR REHEARING

TO THE HONORABLE JUDGES OF THE TEXAS COURT OF CRIMINAL APPEALS:

CHARLES LEE McCALLISTER, Petitioner, moves this Honorable Court pursuant to TEX.R.APP.PROC. 79.2 for rehearing from the rendition of an order refusing his Petition for Discretionary Review in this case and thereafter set aside the judgment of affirmance rendered and entered herein on the

28th day of February, 2006.

Undersigned counsel certifies that this motion is grounded on substantial intervening circumstances which are specified below.

Rehearing should be granted for the following reasons:

1. This Court's failure to exercise its power of supervision and review to correct the manifest miscarriage of justice that has occurred in this case will send a message to the Texas intermediate Courts of Appeals announcing that the doctrine of stare decisis no longer plays a vital role in Texas/American jurisprudence and that mandatory procedural rules requiring specific performance are without substance.

2. As demonstrated below, the Fourteenth Court of Appeals' decision in this Petitioner's case is in conflict with the decisions of this Court, other Courts of Appeals, and constitutionally settled federal precedent, the impact of which threatens the liberty interests of all Texans and citizens who travel Texas roads and highways.

3. This Court's refusal to exercise its power to review the judgment entered in and supervision over the intermediate Fourteenth Court of Appeals in this case render's hollow Petitioner's statutory right, as protected and guaranteed by the Fourteenth Amendment to the United States Constitution, Petitioner's right to a fair, full and adequate review of the judgment entered in the court below.

ARGUMENTS AND AUTHORITIES ON MOTION FOR REHEARING

Argument

1. This Court's failure to

exercise its power of supervision and review to correct the manifest miscarriage of justice that has occurred in this case will send a message to the Texas intermediate Courts of Appeals announcing that the doctrine of stare decisis no longer plays a vital role in Texas/American jurisprudence and that mandatory procedural rules requiring specific performance are without substance.

Petitioner initially complained by his Petition for review that the Court of Appeals failed to address in the manner preserved and subsequently presented on appeal his third point of error which was crucial to a fair determination of the other issues presented on appeal. As pointed out in the Petition for review, the Court of Appeals not only misstated the record evidence so as to accord with its decision to affirm the judgment enter in the trial court, but the Court of Appeals manifestly misconstrued and altered the Petitioner's point of error so as to avoid reaching the merits of Petitioner's arguments. [Petition at pp. 10-13]

It was important and clearly outcome determinative that the Court of Appeals "get it right" since the issue advanced was critical to a fair, reasonable, and adequate resolution of Petitioner's issue raised by his third point of error as well as each of the other points of error advanced by Petitioner in the Court of Appeals.

On direct appeal and on petition for review, Petitioner raised issue that it was error to permit the introduction before the jury of officer Smith's testimony regarding his use of radar and his conclusion that Petitioner was speeding. It was argued to the trial court and before the Court of Appeals that admission of the radar and rate of speed determined from reading the radar device was inadmissible under Tex.R.Evid. 702 and the holdings of this Court. Thus, Petitioner argued in the trial court and on appeal that in the absence of this critical testimony as the basis for the officer's pursuit and arrest, the stop of Petitioner's vehicle was without any reasonable basis so that his arrest violated the Texas and United States Constitutions and moved to suppress for lack of probable cause or reasonable suspicion.

The point of error was clear, distinct, and referenced the pertinent parts of the appellate record so that there would be no misunderstanding what the issue was, why and how it corresponded with the other issues raised, and the unquestionable harm the error of admitting this evidence reaped for the State in securing the judgment of conviction against Petitioner.

After misstating the record regarding officer Smith's testimony,[1] the Court of Appeals summarily rejected

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[1] As pointed out in the petitoin for review at p. 10 fn. 5, a review of the Reporter's Record at Vol. III, pp. 45-46, to reach its conclusion at footnote 10 that: "Moreover, Smith testified that, based on his training and experience, he ***would*** have determined appellant was speeding even without radar." (Emphasis supplied) That he "***could***" make such an assessment does not mean that he "***did***" make such a

Petitioner's pont of error on the basis that one of the cases cited by Petitioner was for speeding whereas Petitioner's conviction was for DWI.

Authorities

The Court of Appeals' summary conclusion that Petitioner's "third issue does not demonstrate either error or harm in the admission of the radar evidence" because "appellant fails to explain how this evidence ... (1) would have been inadmissible *for that purpose* (i.e., to establish reasonable suspicion) due to the lack of evidence he alleges regarding the device; or (2) was material to his conviction for DWI." [Opinion at p. 3] (emphasis in original). The Court of Appeals cited **McClain v. State**, 984 S.W.2d 700, 702 (Tex.App.-Texarkana 1998, pet ref'd), in support of its misstatement of the record where the defendant there stipulated to the introduction of the radar testimony whereas, in this case, no such stipulation was provided. The Court then goes on to state that **Ochoa v. State**, 994 S.W.2d 283, 285 (Tex.App.-El Paso 1999, no pet.), was not applicable since it "involved the admission of radar evidence *as proof of guilt* of speeding." [Opinion at p. 6](emphasis in original).

The Court of Appeals failed to address Petitioner's specific argument, misstated the record testimony that did not justify or comport with the holding it cited, and attempted to distinguish a single case where it ignored the legal issue related to TEX.R.EVID. 702 and distinguished

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determmination. In fact, Smith's testimony is to the contrary. See also, Appellant's Reply Brief at pp. 21-23.

it from Petitioner's case based on the offense charged and not upon the law. The Court of Appeals otherwise did not cite or attempt to distinguish the cases and principles of law on which Petitioner relied.[2]

Most significantly, the court did not discuss the reasoning or application of TEX.R.EVID. 702 and those cases in which the State has the burden of proof by a preliminary showing before scientific evidence may be introduced. Contrary to the Court of Appeals' holding, ***Ochoa v. State*** was relied upon by Petitioner for the proposition that the State had failed to meet its burden required by this Court in cases such as **Emerson v. State**, 880 S.W.2d 759 (Tex.Cr.App. 1994) and **Kelly v. State**, 824 S.W.2d 568 (Tex.Cr.App. 1992), justifying admission of evidence that, by its own witness who testified to his inability to assure that the device was working properly and attested to the fact that he would be incapable of attesting that the device was sufficiently accurate and reliable.

Had the trial court properly excluded officer Smith's testimony regarding his use of radar and its result which was crucial to the State's ability to meet its burden of justifying a the warrantless seizure culminating in Petitioner's warrantless arrest, the trial Court, in accord with Petitioner's trial objections, would have been required

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[2] Petitoner relied on TEX.R.EVID. 702 as interpreted by this Court in **Sexton v. State**, 93 S.W.3d 96 (Tex.Cr.App. 2002); **Matson v. State**, 819 S.W.2d 839 (Tex.Cr.App. 1991); **Kelly v. State**, 824 S.W.2d 568 (Tex.Cr.App. 1992); **Sterling v. State**, 800 S.W.2d 513 (Tx.Cr.App. 513 (Tex.Cr.App. 1990); **Hartman v. State**, 946 S.W.2d 60 (Tex.Cr.App. 1997).

to suppress the evidence secured by officer Smith as a result of the warrantless seizure and subsequent arrest as required by the mandatory directive of Article 38.23 of the Texas Code of Criminal Procedure.

The courts of appeals are required to address every argument raised by a party that is necessary to the disposition of the appeal. TEX.R.APP.PROC. 47.1; **Davis v. State**, 817 S.W.2d 345, 346 (Tex.Cr.App. 1991). Where the court of appeals notes the argument of a party, but does not respond to it, this Court will remand for consideration of the argument. **Light v. State**, 15 S.W.3d 104, 105 (Tex.Cr.App. 2000).[3]

The primary function of a motion for rehearing in its usual context is to request the Court of Criminal Appeals to reconsider its order refusing discretionary review of the grounds for review initially presented. **Gambill v. State**, 692 S.W.2d 106 (Tex.Cr.App. 1985). See also, **Martin v. State**, 761 S.W.2d 26, 34 (Tex.App.-Beaumont 1988)(opinion on motion for rehearing), remanded on other grounds, 764 S.W.2d 562 (Tex.Cr.App. 1989)(per curiam). One court has explained:

> The function of a motion for rehearing is to present to the court the errors of law which have been

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[3] The following cases were remanded for consideration of unaddressed arguments: **Weatherford v. State**, 828 S.W.2d 12 (Tex.Cr.App. 1992); **Wood v. State**, 828 S.W.2d 13 (Tex.Cr.App. 1992); **King v State**, 848 S.W.2d 142 (Tex.Cr.App. 1993); **Ikner v. State**, 848 S.W.2d 161 (Tex.Cr.App. 1993); **Muniz v. State**, 852 S.W.2d 520 (Tex.Cr.App. 1993).

committed by the court, in the opinion of the movant, together with such argument, authorities, and statements form the record which may, in the opinion of the movant, support the motion.

Guilder v. State, 794 S.W.2d 765, 771 (Tex.App.-Dallas 1990)*(opinion on motion for rehearing)*.

In **Rankin v. State**, 974 S.W.2d 707 (Tex.Cr.App. 1996)(opinion on original submission)(Tex.Cr.App. 1998)(opinion on motion for rehearing), the Court held that a court of appeals must adequately explain the basis for its decisions and the reasoning by which its decisions were reached.

Through a motion for rehearing, a party may object to an appellate court's failure to address systemic requirements on original submission **Price v. State**, 93 S.W.3d 358, 364 (Tex.App.-Houston [14th Dist] 2002, pet ref'd), citing **Hughes v. State**, 878 S.W.2d 142, 151 (Tex.Cr.App. 1992), in an opinion rendered by the very panel sitting in this case.

Pursuant to TEX.R.APP.PROC. 66.3(f), this Court has the authority to grant discretionary review where a court of appeals has so far departed fro the accepted and ususal course of judicial proceedings, or so far sanctioned such a departure by a lower court as to call for an exercise of the Court of Criminal Appeals' power of supervision." This Court has explained, if a litigant seeking review on the basis of the court of appeals' failure to consider a matter, the proper disposition by the high court is for that tribunal - "in the exercise of its supervisory authority" – to remand for the intermediate court to make a decision.

Sotelo v. State, 913 S.W.2d 5070, 510 (Tex.Cr.App. 1996); **Lee v. State**, 791 S.W.2d 141, 142 (Tex.Cr.App. 1990).

Finally, as demonstrated herein, the Court of Appeals' treatment of Petitioner's appeal is clearly part of the remaining significant problem with Texas' appellate "justice" system. ***Stare decisis*** is one of the most fundamental and important concepts in American jurisprudence.[4] Inconsistent decision making and disregard for the applicable rules of procedure that are vital to an appellant's right of review violates a cardinal principle of appellate justice – the "uniform and coherent enunciation and application of the law." **Paul D. Carrington et al., *Justice on Appeal*** 11 (1976).[5] Disregard for precedent and

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[4] The doctrine of *stare decisis* requires courts "to abide by, or adhere to, [previously decided cases." **Black's Law Dictionary** 1261 95th ed. 1979). Thus, if a case before the court has similar facts and raises issues similar to those of a previously decided case, the present case should be decided in the same manner as the earlier case. In the **Federalist Papers**, Alexander Hamilton emphasized the importance of precedent and stare decisis when he explained that "[t]o avoid arbitrary discretion in the courts, it is indispensable that they [the courts] should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular cases that comes before them." **The Federalist No. 78**, at 529 (Alexander Hamilton)(Jacob E. Cooke ed., 1961).

[5] See also, **Henry J. Friendly, *Indiscretion About Discretion***, 31 Emory L. J. 747, 758 (1982)(noting that uniformity is "the most basic principle of jurisprudence"); **Ruth Bader Ginsburg & Peter W. Huber, The Intercircuit Committee**, 100b Harv. L. Rev. 1417, 1424-

rules of procedure makes it impossible for lawyers, litigants, and trial courts to ascertain precisely what law governs any particular dispute. The resulting uncertainty increases litigation, wastes judicial resources, and leads to an inconsistent application of the law so that citizens reliance upon interpretations of the law are frustrated since it leads to inconsistent and even contrary application by law enforcement officers and thus breeds contempt by those entrusted with its enforcement and compliance.

The Court of Criminal Appeals, in the exercise of its supervisory authority and discretionary power of review, should remand this case back to the Fourteenth Court of Appeals and direct that the Court of Appeals vacate its judgment of affirmance and require the Court of Appeals to reinstate Petitioner's appeal and to thereafter provide an appropriate analysis under the proper and applicable standard of review.

Argument

2. As demonstrated below, the Fourteenth Court of Appeals' decision in this Petitioner's case is in conflict with the decisions of this Court, other Courts of Appeals, and constitutionally settled federal precedent, the impact of which threatens the liberty interests of all Texans and citizens who

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1425 (1987)(stating that "[u]niformnity promotes the twin goals of equity and judicial integrity").

travel Texas roads and highways.

Petitioner pointed out in his brief on appeal and urged as error in his petition for review, that Officer Smith's testimony that he believed Petitioner had committed the offense of fleeing or attempting to elude a police officer was unreasonable and could not justify the officer's stop, seizure and arrest. As a basis for rejecting Petitioner's arguments that the trial court erred in denying his motion to suppress, the Court of Appeals explained itself past Petitioner's claim that the officer's pursuit to stop and seize Petitioner for speeding was without any articulable basis other than as officer Smith's testimony regarding his conscious use of a defective device as justification for stopping and seizing motorists. Having explained that it was rejecting Petitioner's third point of error because in one of the cases cited by Petitioner, ***Ochoa v. State, supra***, the appellant in ***Ochoa*** had been charged with speeding whereas the Petitioner here was eventually charged and convicted for DWI. Therefore, held the Court of Appeals, since officer Smith had a reasonable basis for stopping Petitioner for the offense of speeding, Petitioner's failure to immediately stop his vehicle on the side of a rain soaked interstate freeway, officer Smith had probable cause justifying Petitioner's warrantless arrest for fleeing or attempting to elude a police officer. Thus, after ignoring Petitioner's argument that officer Smith's pursuit and objective acts to conduct a warrantless illegal seizure, the Court of Appeals concluded that "Because appellant maintained his speed and bypassed several safe opportunities to stop despite Smith's signals to do so, Smith had probable cause to arrest him without a warrant for fleeing or attempting to elude. See TEX.TRANSP. CODE

ANN. § 543.001." [Opinion at p. 2] (footnotes omitted).

Thus, holds the Court of Appeals, though agreeing that Petitioner was under arrest from the very inception after he stopped his vehicle, since Petitioner did not stop immediately but, instead, traveled a short distance exited the interstate freeway and pulled down a side street off the main traveled roadway, conduct that officer Smith agreed was safe and prudent.

On cross-examination, the record disclosed that officer Smith's testimony negated each element of the offense of fleeing or attempted to elude. This, Petitioner argued at trial and on appeal, established that the officer's belief was unreasonable and did not support finding that the officer had probable cause to subject Petitioner to a full bona fide arrest. Petitioner raised issue in his Petition for review that the Court of Appeals' findings in direct contrast to those made by the trial court and the panel's conclusion that probable cause existed justifying officer Smith's arrest of Petitioner was not supported by the record. Indeed, these erroneous findings and conclusion were made in the face the officer's agreement that Petitioner's conduct of pulling off the rain soaked interstate highway onto a side street off the feeder and main traveled portion of the road was safe and prudent. Thus, as argued in the petition for review, to permit the Court of Appeals' holding in this case to stand would render the statute, as applied, so unconstitutionally vague and overbroad as would subject purely innocent, prudent, and reasonable acts and conduct of citizens to the whim and caprice of a police officer's arbitrary interpretation of the law prohibited by the State and Federal Constitutions.

Authorities

Courts have routinely upheld convictions for evading where the defendant traveled at high speeds or speeds well in excess of the speed limit. See **Adams v. State**, 669 S.W.2d 391 (Tex.App.-Dallas 1984, no writ)(holding that defendant's conviction for evading should be affirmed where she exceeded the speed limit of 55 mph); see also **Rogers v. State**, 832 S.W.2d 442 (Tex.App.-Austin 1992, no writ)(holding that defendant's conviction for evading should be affirmed when his motorcycle traveled 95 mph). See, **Alejos v. State**, 555 S.W.2d 444 (Tex.Cr.App. 1977); **Harvey v. State**, 515 S.W.2d 108 (Tex.Cr.App. 1974); **Crabb v. State**, 503 S.W.2d 260 (Tex.Cr.App. 1974). The most recent case that discusses the offense of fleeing or attempting to elude a police officer is **Quanell X. Abdul Farrakhan v. State of Texas**, No. 01-04-01205-CR, ___ S.W.3d ___, 2006 WL 3438673 (Tex.App.-Houston [1st Dist] Nov. 30, 2006).

In this Petitioner's case, officer Smith by his own testimony negated each and every element of the offense giving rise to his belief that Petitioner had committed the offense of fleeing or attempting to evade a police officer. Notwithstanding the officer's testimony that worked essentially to establish his mistaken belief that an offense had been committed in his presence, the Court of Appeals simply ignored this overwhelming evidence of mistake on the officer's part and went on to hold that there was sufficient basis for the officer to affect a full blown arrest by placing Petitioner, who was purportedly being stopped for speeding, at gun point. The Court of Appeals relied upon testimony from officer Smith that while pursuing Petitioner for speeding, Petitioner 'maintained his speed

and bypassed several safe opportunities to stop despite Smith's signals to do so, Smith had probable cause to arrest him without a warrant for fleeing or attempting to elude. See TEX. TRANSP. CODE ANN. § 543.001." In so holding, the Court of Appeals' has rendered a decision in direct conflict with the holdings of the federal courts in cases such as **United States v. Miguel**, 111 F.3d 666 (9th Cir. 2004). Furthermore, officer Smith conceded that Petitioner's conduct of pulling off the rain soaked interstate highway and stopping his vehicle at a place off the main roads was both safe and prudent. Nonetheless, the Court of Appeals concluded that it was proper to ignore the officer's testimony negating a reasonable and articulable basis for the officer's arrest. Therefore, Petitioner's motion for rehearing should be granted to correct the erroneous application and statement of the law being espoused by the Court of Appeals.

CONCLUSION

"In a government of law," said Justice Brandeis, "existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means – to declare that the Government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." **Olmstead v. United States**, 277 U.S. 438 (1925).

In order that the stare decisis of Texas courts is not weakened further by holdings that are inconsistent and in conflict with the rights of citizens throughout the State of Texas as noted in **Professor Andrew T. Solomon's review, *"A Simple Prescription for Texas's Ailing Court System: Stronger Stare Decisis"***, 37 St. Mary's L. J. 417 (2006), Petitioner's motion for rehearing should be granted.

PRAYER

Petitioner prays that this Honorable Court grant discretionary review, reverse the conviction, and remand for a new trial, or in the alternative, remand to the court of appeals for further consideration and grant such other and further relief to which this Court deems fair, just and equitable.

Respectfully submitted,

Charles Lee McCallister
Appellant - Attorney at Law
State Bar No. 13354700
1420 West 15th St., Suite 100
Houston, Texas 77008-3728
Ph: (713)869-8300

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing Motion for Extension of Time has been this day delivered to the Clerk of the Fourteenth Court of Appeals for delivery to counsel for the State of Texas with the Office of the Harris County District Attorney, Appellate Division, 1201 Franklin, Suite

300, Houston, Texas 77002 and the office of the State Prosecuting Attorney, P. O. Box 12405, Austin, Texas 78711.

Dated this 22nd day of December, 2006.

_____

Charles Lee McCallister

APPENDIX 4

PD-0993-06

IN THE TEXAS COURT OF CRIMINAL APPEALS

CHARLES LEE McCALLISTER, Petitioner
vs.
THE STATE OF TEXAS, Respondent

Event Information:	**PDR DISP**
Description:	**Pro Se**
Date:	**11/22/2006**
Disposition:	**Refused**
Opinion Written:	

Opinions Related to this Event:

Date Issued

APPENDIX 5

PD-0993-06

IN THE TEXAS COURT OF CRIMINAL APPEALS

CHARLES LEE McCALLISTER, Petitioner
vs.
THE STATE OF TEXAS, Respondent

Event Information:	**REHEAR DISP - PDR**
Description:	**Pro Se**
Date:	**1/31/2007**
Disposition:	**Motion Denied**
Opinion Written:	

Opinions Related to this Event:

Date Issued

APPENDIX 6

PD-0993-06

IN THE TEXAS COURT OF CRIMINAL APPEALS

CHARLES LEE McCALLISTER, Petitioner
vs.
THE STATE OF TEXAS, Respondent

Event Information:	**FINAL DISP/REHEAR**
Description:	**Pro Se**
Date:	**1/31/2007**
Disposition:	**Refused**
***Opinion Written:**	

Opinions Related to this Event:

Date Issued

APPENDIX 7

NO. 14-04-00375-CR

IN THE COURT OF APPEALS
FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT
SITTING AT HOUSTON, TEXAS

CHARLES LEE McCALLISTER, Appellant

versus

THE STATE OF TEXAS, Appellee

On Petition for Writ of Certiorari to the United States Supreme Court

MOTION TO RECALL THE MANDATE

COMES NOW the Appellant, Charles Lee McCallister, pro se, and pursuant to Fed.R.App.P. 41(b) and TEX.R.APP.P. 18.2, respectfully moves this Honorable Court for an Order recalling and staying the issuance of the mandate pending Appellant's application to the United States Supreme Court for a writ of certiorari.

In support thereof, counsel states as follows:

1. Appellant was convicted of first time Driving While Intoxicated [DWI] as alleged in an information following a jury trial in the Country Criminal Court at Law No. 14 of Harris County, Texas.

2. On February 24, 2004, Appellant received a

sentence of 15 days assessed by the jury and the trial court, contrary to law, suspended that sentence and placed Appellant on community supervision for a period of one year to expire on February 23, 2005, a copy of which is hereto attached and made reference herein the same as if copied in full and set forth at length.

3. Notice of Appeal was entered on March 25, 2004, after the sentence had expired, and Appellant was required to post an appeal bond in the amount of $4,000.00.

4. The Fourteenth Court of Appeals entered its judgment and written order dated February 28, 2006, affirming the conviction and sentence. Motion for Rehearing was summarily overruled.

5. Thereafter, Appellant filed with the Texas Court of Criminal Appeals his petition for discretionary review and that Court summarily denied review by order entered on November 22, 2006. A petition for rehearing was timely filed and summarily denied by the Court without written order on January 31, 2007.

6. Appellant intends to timely file a petition for writ of certiorari with the Supreme Court of the United States and respectfully seeks a stay during the pendency of the Supreme Court's consideration of said petition.

7. This motion is not filed for dilatory purposes but rather because the Supreme Court will be presented with a substantial question regarding the appellate courts of the State of Texas and their use of procedures that allows the intermediate appellate courts of Texas to ignore appellate issues presented by the parties, permits these intermediate appellate courts to sua sponte raise issues that are designed only to justify a particular issue of law discussed, and thereby permits, over strenuous objection, the violation of procedures

that are applied to some but not others when presenting their appeals to these intermediate appellate courts. As a result, notwithstanding the corrective authority and constitutional duty of the Court of Criminal Appeals to remedy these unreasonable tactics that essentially deprive an appellant of the right to a full and fair resolution of issues raised on appeal, Texas intermediate courts have so far deviated from the course of consistency in the application of the laws, that the constitutional doctrine of stare decisis is weakened by holdings that are inconsistent and in conflict with the rights of citizens throughout the State of Texas insomuch that the right to appeal is rendered meaningless. See, **Professor Andrew T. Solomon's review, *"A Simple Prescription for Texas' Ailing Court System: Stronger Stare Decisis"***, 37 St. Mary's L. J. 417 (2006). The denial of this Appellant's right to a full and fair appellate process that is otherwise accorded others who appeal their convictions and sentences under the same or similar circumstances, is a clear deviation of constitutional practices in general and a denial of due process and equal protection of the law in particular as it applies to Appellant.

8. Furthermore, consistent with the practices of Texas appellate courts, the strain of deviation from constitutional standards continues it deterioration downward where, contrary to the holdings of the United States Supreme Court and Federal Courts of Appeals, as well as the law when applied appropriately in accord with **TEX. CODE CRIM. PROC. Art. 44.07**, since the return of the mandate of the Court of Appeals, this persistent pattern and continuing course of conduct is reflected by the trial court's initiation of executing a process by which the sentence being executed against the Appellant is designed to punish Appellant in retaliation for having exercised his right to appeal.

9. Therefore, exceptional circumstances exist such that, in the absence of a recall of the mandate, Appellant will suffer irreparable injury if the stay is not granted, especially

where there is a reasonable chance that at least four justices of the Supreme Court will vote for the court to hear the case and that, if the case is taken, a majority of the court will vote to reverse and, consistent with the holding in **North Carolina v. Pearce**, 395 U.S. 711 (1969), the potential remedy available may result in setting aside the void sentence. ***Id.*** at 714-715, 726.

10. The issues, as in **Church of Scientology of California v. United States**, 506 U.S. 9 (1992), are not moot[1], but consist of a persistent pattern and continuing course of conduct evidenced from the record as a fact that is subject to repetition yet evading review. See, e.g., **Super Tire Engineer Co. V. McCorkle**, 416 U.S. 115 (1974).

11. The Petition for Writ of Certiorari is due to be post marked by mid-night on May 1, 2007, which is being prepared for filing this date.

12. On May 1, 2007, in execution of the mandate of this Court and as directed by the Honorable Mike Fields, Judge of the County Criminal Court at Law 14 of Harris County, Texas, Defendant has been taken into custody pending issuance of the recall and stay of mandate.

WHEREFORE, PREMISES CONSIDERED, Defendant prays and moves that an order issue staying the mandate issued by this Court in the above captioned and numbered cause pending final issuance of an order by the United States Supreme Court on Defendant's petition for writ of certiorari.

---

[1] See also, **Spomer v. Littleton**, 414 U.S. 514 (1974)

Respectfully submitted,

_____

Charles Lee McCallister
Attorney at Law
State Bar No. 13354700
1420 West 15th St., Suite 100
Houston, Texas 77008-3728
Ph. # (713) 869-8300

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Motion for Recall and Stay of Mandate has been this day placed in the United States Mail, postage prepaid, addressed to the office of the State Prosecuting Attorney located in Austin, Texas, and to the office of the Harris County District Attorney located at 1201 Franklin, Houston, Texas.

Dated: May 1, 2007.

_____

Charles Lee McCallister
Attorney for Appellant

BEST AVAILABLE COPY

JUDGMENT ON PLEA BEFORE JURY
COURT/JURY ASSESSING PUNISHMENT

CAUSE NO. 1191616

THE STATE OF TEXAS
VS.
Charles Lee McCallister
(Name of Defendant)

IN THE ___ DISTRICT COURT
COUNTY CRIMINAL COURT AT LAW NO. 14
OF HARRIS COUNTY, TEXAS

AKA

Date of Judgment: FEB 17 2004 | Date Sentence Imposed: FEB 17 2004 | Sentence to Begin: 2-24-04 | Date of Offense: 9-1-03

Attorney for State: L. Davidson

Attorney for Defendant: M. Benedetti ☐ Defendant Waived Counsel

Offense Convicted of: DWID

☒ A MISDEMEANOR, CLASS: A (B) C ☐ A FELONY DEGREE: SJ | 3rd | 2nd | 1st | CAPITAL

Jury Verdict: GUILTY Foreperson: Celina Benavides

(Circle appropriate selection – N/A = not available or not applicable)

Plea to Enhancement(s): 1st Paragraph: True | Not True | N/A 2nd Paragraph: True | Not True | N/A Charging Instrument: Complaint | Indictment | Information

Findings on Enhancement(s): 1st Paragraph: True | Not True | N/A 2nd Paragraph: True | Not True | N/A Plea: Guilty | Nolo Contendere | Not Guilty

Affirmative Findings:
Deadly Weapon: Yes | No (N/A) Family Violence: Yes | No (N/A) Victim Selected by Bias/Prejudice: Yes | No (N/A) Victim Younger Than 17 years: Yes | No (N/A) Controlled Substance Used in Commit Crime: Yes | No (N/A)

Punishment Imposed by: COURT / JURY
and Place of Confinement:

15 days

☐ Institutional Division, TDCJ
☐ State Jail Division, TDCJ
☒ Harris County Jail
☐ Fine Only

☒ Sentence suspended, Defendant placed on community supervision for 1 yr
☒ SEE SPECIAL INSTRUCTIONS, incorporated herein by reference.

OK

☐ Fine in the Amount of $ ___

Time Credited: ___ days served incarceration: ___ days

Court costs: fine and costs: ___ Appeal bond: ___ fine and costs: ___ Prior criminal convictions: fine and costs: ___ COURT COSTS: $ 271.00

271

(Mark appropriate selection below, if applicable)

☐ Name changed from ___

☐ Judgment Addendum incorporated herein by reference.

☐ Driver's license is suspended for a period of ___ days/months/years.

☐ The Defendant is entitled to ___ days credit toward suspension of driver's license.

☐ It is ordered by the Court, that any weapon(s) seized in this case is/are hereby forfeited.

☐ Educational program waived in accordance with Article 42.12 Sec. 11(h), upon a finding of good cause by the Court.

☐ In accordance with Section 12.44(a), Penal Laws of Texas, the Court finds that the ends of justice would best be served by punishment as a Class A misdemeanor. The Defendant is adjudged to be guilty of a state jail felony and is assessed the punishment indicated above.

☐ In accordance with Section 12.44(b), Penal Laws of Texas, the Court authorizes the prosecuting attorney to prosecute this cause as a Class A misdemeanor. The Defendant is adjudged to be guilty of a Class A misdemeanor and is assessed the punishment indicated above.

PJMCVC012 12/10/99

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The cause being called for trial in Harris County, Texas, unless otherwise announced, the State appeared by her District Attorney as named above and the Defendant named above appeared in person with Counsel as named above; or the Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel as indicated above in writing in open court, and the said Defendant having been duly arraigned and it appearing to the Court that Defendant was mentally competent and having pleaded as shown above to the charging instrument, both parties announced ready for trial and thereupon a jury, to-wit, the above named foreperson and eleven others for a felony offense indicated above or the above named foreperson and five others for a misdemeanor offense indicated above, was duly selected, impaneled, and sworn, the jury having heard the charging instrument read and the Defendant's plea thereto and having heard the evidence submitted and having been duly charged by the Court, retired in charge of the proper officer to consider the verdict, and afterward came into Court by the proper officer, the Defendant and the defendant's counsel, if any, being present, and returned into open court the verdict set forth above, which was received by the Court and is here now entered upon the minutes of the Court as shown above.

The Defendant having previously elected, in writing and at the time of his plea, to have punishment assessed as indicated above. And when Defendant is shown above to have elected to have the jury assess punishment, such jury was called back into the box and heard evidence relative to the question of punishment and having been duly charged by the Court, they retired to consider such question and after having deliberated they returned into Court the verdict shown under punishment above; and when Defendant is shown above to have elected to have punishment fixed by the Court, in due form of law further evidence was heard by the Court relative to the question of punishment and the Court fixed punishment of the Defendant as shown above.

IT IS CONSIDERED, ORDERED, AND ADJUDGED by the Court, in the presence of the Defendant, that the said judgment be and the same is hereby in all things approved and confirmed, and that the Defendant is adjudged guilty of the offense set forth above as found by the verdict of the jury, and said Defendant is assessed above. Further, the Court finds the Presentence Investigation, if so ordered, was done according to the applicable provisions of Art. 42.12, Sec. 9, code of Criminal Procedure.

IT IS ORDERED by the Court that if the punishment assessed against the Defendant is confinement in the Institutional Division of the Texas Department of Criminal Justice (TDCJ) that the Defendant be delivered by the Sheriff of Harris County, Texas immediately to the Director of the Institutional Division or the State Jail Division, TDCJ, or any other person legally authorized to receive such convicts, and said Defendant shall be confined in the Institutional Division or State Jail Division, TDCJ for the period indicated above, in accordance with the provisions of the law governing the Institutional Division or State Jail Division, TDCJ. The Defendant is remanded to the custody of the Sheriff of Harris County until the Sheriff can obey the directions of this sentence.

IT IS ORDERED by the Court that if the punishment assessed against the Defendant is confinement in the Harris County Jail that the Defendant is remanded to the custody of the Sheriff of Harris County, Texas, unless the Defendant is instructed to voluntarily surrender to the Sheriff on the date the sentence is to begin, as indicated above. The Sheriff shall confine the Defendant in the Harris County Jail for the period indicated above, and until fine and costs are fully satisfied in accordance with law.

IT IS ORDERED by the Court that if the punishment assessed against the defendant is for a fine only, the Defendant is ordered to immediately proceed to the Office of the Harris County Sheriff and pay all fine and court costs as ordered by the Court in this cause, unless the Court orders the Defendant to be committed to the custody of the Sheriff of Harris County, Texas on the date the sentence is to begin, as indicated above, to be confined in the Harris County Jail until the fine and costs are fully satisfied in accordance with law, or as indicated above.

IT IS ORDERED by the Court that the sentence indicated above is to be executed, unless it is indicated above that the sentence is to be suspended, and if so, the Defendant is placed on community supervision for the period indicated above pending his abiding by and not violating the terms and conditions of his community supervision.

IT IS ORDERED by the Court that this sentence runs concurrent with any other sentence(s) unless it is indicated on the Judgment Addendum that the sentence is to run cumulatively.

Signed and entered on FEB 17 2004

x

M Fields

JUDGE PRESIDING

Community Supervision Expires on: 2/23/05

Notice of Appeal: 3-25-04

Mandate Received: _____

After Mandate Received, Sentence to Begin Date is: _____

Received on _____ at _____ AM / PM
Sheriff, Harris County, Texas

By _____ Deputy

Entered	
Verified	
LCBT	
LCBU	

SPECIAL INSTRUCTION OR NOTES Report to HCT 2-18-04 24
~~By 900 am then continue~~
Three days @ Cop beginning 3/1/04
2/27/04 by Six pm

Right Thumbprint

CRIMSC(612 12/10/99 3

FILED
2004 FEB 17 PM 1:51
CHRIS DANIEL
DISTRICT CLERK

CAUSE NUMBER 1191661

THE STATE OF TEXAS
VS.
Charles Lee McCallister

IN COUNTY CRIMINAL COURT
AT LAW NO. 014
HARRIS COUNTY, TEXAS

CONDITIONS OF COMMUNITY SUPERVISION

On this the 24th day of January, 2004, the defendant being granted 15 days in the Harris County Jail probated 1 Year Community Supervision for the misdemeanor offense of Driving While Intoxicated in accordance with section 3 of Article 42.12, of the Texas Code of Criminal Procedure is here by ordered to abide by all of the following conditions and terms of Community Supervision during the period of community supervision.

(1) Commit no offense against the laws of this or any other State or of the United States.

(2) Avoid injurious or vicious habits. You are forbidden to use, possess, or consume any controlled substance, dangerous drug, marijuana, alcohol or prescription drug not specifically prescribed to you by lawful prescription. You are forbidden to use, consume, or possess alcoholic beverages.

(3) Avoid persons or places of disreputable or harmful character, specifically: _____.

(4) Report immediately in person, to the Community Supervision Officer for the County Criminal Court at Law No. 014 on the 24th day of January, 2004 and continue to report to the Community Supervision Officer on the 24th of each month thereafter or as directed by the Community Supervision Officer for the remainder of the supervision term unless so ordered differently by the Court.

(5) Permit a Community Supervision Officer to visit you at your home, place of employment or elsewhere.

(6) Abide by the rules and regulations of the Harris County Community Supervision and Corrections Department (hereinafter referred to as HCCS&CD). Refrain from disorderly conduct, abusive language or disturbing the peace while present at any HCCS&CD office or facility.

(7) Work faithfully at suitable employment and present written verification of employment (including all attempts to secure employment) to your Community Supervision Officer on each reporting date. You must notify HCCS&CD within 48 hours of any change in your employment status.

(8) Remain within a specified place, to wit: Travel restricted to counties. You may travel outside of the State of Texas. You must notify HCCS&CD within 48 hours of any change of residence.

(9) Support your dependents as required by law. Provide your Community Supervision Officer with a certified copy of all Court orders requiring payment of child support.

(10) Submit to **MONTHLY** drug/alcohol analysis by authorized personnel of HCCS&CD, including any department having courtesy supervision jurisdiction. Provide proof of any medication legally prescribed to you prior to submitting a specimen.

(11) Participate in the HCCS&CD Community Service Restitution Program (CSRP). You shall perform a total of 24 hours, at the rate of 10 hours per month beginning March 24, 2004. You may perform CSRP with a non-profit agency provided you show proof to your officer of acceptance/agreement from the agency to perform your hours with them. You must show monthly progress to your officer from the agency until completion.

CONDITIONS OF COMMUNITY SUPERVISION

FOR: Charles Lee McCallister

CAUSE NUMBER: 1191681

(12) Pay the following fees through HCCS&CD as specified herein. All payments MUST be in the form of a money order or cashier's check. Personal checks will not be accepted.

12.1 Pay a **Supervision Fee** at the rate of $28.00 per month for the duration of your community supervision beginning March 24, 2004 to HCCS&CD.

12.2 Pay **Court Costs** of $771.00 at the rate of $30.00 per month beginning March 24, 2004 to Harris County through HCCS&CD. You are given credit for 0 days.

12.3 Pay **Laboratory Fees** of $6.00 per month for the duration of your community supervision beginning March 24, 2004 to HCCS&CD.

12.4 Pay a $10.00 fee for an **Offender Identification Card** by March 24, 2004 to HCCS&CD.

12.5 Pay $50.00 to **Crime Stoppers of Houston** by March 24, 2004 through HCCS&CD.

(13) Report in person to HCCS&CD by March 24, 2004 for the purpose of creating and obtaining your **Offender Identification Card**. You are to carry this identification card on your person at all times.

(14) Submit to an **alcohol/drug evaluation** by March 24, 2004. If SALCE is 4 or more,. and at anytime thereafter as directed by your Community Supervision Officer. Attend treatment and aftercare as recommended. Comply with all program rules, regulations and guidelines until successfully discharged or released by further order of the Court. On each reporting date, submit written verification of your enrollment, attendance and/or successful completion of the program to your Community Supervision Officer, to be retained in HCCS&CD's file.

(15) Participate in the **HCCS&CD Maximum Supervision Program** any time that you are assessed by HCCS&CD to require maximum supervision. Comply with all program rules, regulations and guidelines until successfully discharged or released by further order of the Court.

(16) You shall not use, possess, or consume any controlled substance, dangerous drug, marijuana, or alcohol of any kind unless legally prescribed pursuant to a lawfully written physician's order of prescription.

(17) Submit to an evaluation of your **educational skill level** by March 24, 2004. If it is determined that you have not attained the average skill of students who have completed the sixth grade in public schools in this State, you shall participate in the HCCS&CD program that teaches functionally illiterate persons to read.

(18) Participate in and complete, within 180 days from the date Community Supervision is granted, an **approved alcohol/drug education program, Texas D.W.I. Intervention Program for Repeat Offenders** as required by V.A.C.C.P. Art. 42.12, Sec 13. Comply with all program rules, regulations, and guidelines until successfully discharged or released by further order of the Court.

(19) Attend a **D.W.I. Victim Impact Panel(s)** by August 24, 2004.

(20) **Maintain Financial Responsibility** to satisfy the Requirements of ARTICLE 6701h, REVISED STATUTES and furnish evidence of such Financial Responsibility when requested by any law enforcement officer, the Court, or any employee of HCCS&CD.

(21) Do not drive or operate a motor vehicle in Texas without a valid **Texas Driver's License.**

(22) Provide a breath specimen for **breathalyzer/intoxilyzer analysis** if requested by any law enforcement officer.

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CONDITIONS OF COMMUNITY SUPERVISION

CAUSE NUMBER: 1191681

FOR: Charles Lee McCallister

(23) Upon receipt of a Valid Texas or Occupational Drivers License, you are only to operate a motor vehicle equipped with a deep-lung breath analysis mechanism to make impractical the operation of the motor vehicle if ethyl alcohol is detected in your breath beginning February 24, 2004 until released by further order of the Court. You may return to court after 60/90 days for removal provided you have attended alcohol/drug treatment and show proof of such to the court.

(24) Participate in Alcoholics Anonymous. Attend 30 meetings per within 60days beginning February 24, 2004. Attend as ordered until successfully discharged or released by further order of the Court. On each reporting date, submit written verification of your attendance to your Community Supervision Officer, to be retained in HCCSCD's file.

(25) You are ordered to serve not less than and no more than 3 days in the Harris County Jail beginning February 27, 2004.

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CONDITIONS OF COMMUNITY SUPERVISION

FOR: Charles Lee McCallister

CAUSE NUMBER: 1191981

You are hereby advised that under the laws of this State, the Court shall determine the terms and conditions of Community Supervision, and may at any time during the period of Community Supervision, alter or modify the Conditions of Community Supervision.

The Court also has the authority at anytime during the period of Community Supervision to revoke the Community Supervision when a preponderance of the evidence establishes a violation of one or more of the conditions set forth above. The Clerk of the Court has furnished me with a copy of the terms and conditions of Community Supervision.

Community Supervision expires the 22nd day of February A.D. 2005

Charles Lee McCallister, DEFENDANT — 2/24/2004 DATE

Signed this 24th day of February A.D. 2004

Michael Fields, PRESIDING JUDGE

Glenda Chachere, COURT LIAISON OFFICER — 2/24/2004 DATE

SPN: 00782063

PLEA: GUILTY

Defendant's Right Thumbprint

V1005-P0139

APPENDIX 8

IN THE FOURTEENTH COURT OF APPEALS
SITTING AT HOUSTON, TEXAS

Case No. 14-04-0375-CR

CHARLES LEE McCALLISTER, Appellant
vs.
THE STATE OF TEXAS, Appellee

EVENT INFORMATION:

Event Type:	**Motion to Recall Mandate Disposed**
Description:	**Appellant**
Date:	**5/10/2007**
Disposition:	**Motion Or Writ Denied**

Opinions Related to this Event

Date Issued

appellant must show that the trial court would have committed error in overruling the objection. *Ex parte White*, 160 S.W.3d 46, 53 (Tex. Crim. App. 2004).

In this case, appellant contends that the illegality of his arrest and precluding the State from introducing evidence of his post-arrest silence were both central to his defense. However, appellant failed to develop a record of his trial counsel's reason for not requesting an article 38.23 instruction, and has not shown that a choice not to pursue the legality of his arrest with the jury was either unreasonable as a matter of law or clearly more persuasive than the issues counsel elected to emphasize. **ftnref16[16]** ftnref16 In addition, the unobjected to comments on appellant's post-arrest silence included only his response to requests for identification and reference to his refusal of field sobriety testing, neither of which violated his privilege against self-incrimination. *See Griffith*, 55 S.W.3d at 603; *Miffleton*, 777 S.W.2d at 79-80. Because the trial court would not have erred in overruling these objections, his counsel cannot be deemed ineffective for failing to assert them. *See White*, 160 S.W.3d at 53. Similarly, appellant has provided no basis to conclude that, but for these alleged errors, there is a reasonable probability that the outcome of his trial would have been a not guilty verdict or a lesser punishment. *See Bone v. State*, 77 S.W.3d 828, 837-38 (Tex. Crim. App. 2002). Because appellant's sixth issue thus fails to demonstrate ineffective assistance of counsel, it is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman

Justice

Judgment rendered and Memorandum Opinion filed February 28, 2006.

Panel consists of Justices Edelman, Seymore, and Guzman.